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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 87

THE PUBLIC UTILITIES COMMISSION OF OHIO,
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID
COMMISSION, ET AL., APPELLANTS,

vs.

UNITED FUEL GAS COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

FILED MAY 5, 1943

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO, EAST-
ERN DIVISION**

In Equity

**UNITED FUEL GAS COMPANY, a Corporation organized and
existing under the laws of the State of West Virginia,
Plaintiff,**

vs.

**THE PUBLIC UTILITIES COMMISSION OF OHIO, created and
existing under the laws of the State of Ohio; Edward J.
Hopple, Chairman of said Commission; Charles F. Scha-
ber and Roy D. Williams, members of said Commission;
John W. Bricker, Attorney General of the State of Ohio;
Donald C. Power, Special Counsel for said The Public
Utilities Commission of Ohio; The City of Portsmouth,
a municipal corporation; and Portsmouth Gas Company,
a corporation organized and existing under the laws of
the State of Ohio, Defendants**

BILL OF COMPLAINT—Filed July 3, 1935

**To the Honorable Judges of the District Court of the United
States for the Southern District of Ohio:**

United Fuel Gas Company, a corporation, brings this
its bill of complaint against The Public Utilities Commission
of Ohio, Edward J. Hopple, Chairman of said Commis-
sion, Charles F. Schaber and Roy D. Williams, members
of said Commission, John W. Bricker, Attorney General
of the State of Ohio, Donald C. Power, Special Counsel
for said The Public Utilities Commission of Ohio, The City
of Portsmouth, a municipal corporation, and Portsmouth
Gas Company, a corporation, defendants, and respectfully
shows:

I

United Fuel Gas Company is a corporation duly organ-
ized and existing under and by virtue of the laws of the
State of West Virginia, and is a citizen and resident of
said State, and is engaged in the production, transporta-
tion, distribution and sale of naturel gas for light and

fuel to certain of the inhabitants of southern West Virginia, [fol. 2] and is also engaged in selling natural gas so produced by it and purchased by it from others, to other companies or distributing agencies, by which it is sold to the inhabitants of other States of the Union for the purposes of light and heat; and that the principal office and place of business of said United Fuel Gas Company is at the City of Charleston, in the Southern District of West Virginia.

The defendant The Public Utilities Commission of Ohio, is a body created and existing under and by virtue of the laws of the State of Ohio and is exercising the powers conferred upon it by the laws of said State of Ohio, as the same exist at this time; that said Commission has its principal office in the City of Columbus, in said State, and in said Southern District of Ohio, and is constituted as hereinafter set forth, and is a citizen and resident of said State of Ohio and of the Southern District thereof.

The defendant Edward J. Hopple is the Chairman of said The Public Utilities Commission of Ohio and is a citizen of the State of Ohio and a resident of the City of Cleveland, in the Northern District of said State of Ohio.

The defendant Charles F. Schaber is a citizen of the State of Ohio and a resident of the City of Bucyrus, in the Northern District of said State.

The defendant Roy D. Williams is a citizen of the state of Ohio and a resident of the City of Athens, in the Southern District of said State.

The said last three named defendants are the duly appointed, qualified and acting members of said defendant The Public Utilities Commission of Ohio, the said Edward J. Hopple, under the provisions of law creating said Commission, having been designated to act as Chairman thereof and is now exercising the powers and duties thereof.

The defendant John W. Bricker is a citizen of the State of Ohio and a resident of the City of Columbus, in the Southern District of said State, and is the duly elected, qualified and acting Attorney General of the State of Ohio and is charged with the duty of enforcing the laws of said State.

[fol. 3] The defendant Donald C. Power is a citizen of the State of Ohio and a resident of the City of Columbus, in the Southern District of said State, and is the duly appointed, qualified and acting Special Counsel for said The Public Utilities Commission of Ohio, under and by virtue

of the provisions of law, and is charged by law with the duty of enforcing the orders of said Commission.

The defendant The City of Portsmouth is a municipal corporation, organized and existing under the laws of the State of Ohio, situate in the Southern District of Ohio, and is a citizen and resident of said Southern District.

The defendant Portsmouth Gas Company is a corporation organized and existing under the laws of the State of Ohio, having its principal office and place of business at the City of Portsmouth, Ohio, in the Southern District of said State, and is a citizen and resident of said Southern District of Ohio.

II

This suit is of a civil nature, in equity, and is brought for the purpose of obtaining a declaratory judgment that the two orders of The Public Utilities Commission of Ohio, one entered on the 18th day of April, 1935, and the other on the 29th day of May, 1935, which orders require the plaintiff to submit to said Commission such evidence as will show that the rate which it charges for natural gas to the defendant Portsmouth Gas Company is not in excess of a fair and reasonable rate, are unconstitutional and void, as well as for the purpose of enjoining the enforcement of said orders; that the natural gas sold by the plaintiff herein to the said Portsmouth Gas Company is produced or purchased from other producers by the plaintiff in the States of West Virginia and Kentucky, and transported in a continuous flow, through pipe lines, from the said States of West Virginia and Kentucky and delivered by it to the said Portsmouth Gas Company in the State of Ohio, without commingling the same with any gas produced or purchased in Ohio and without reducing the pressure at which the same is so transported, prior to such delivery, and said sale and delivery is, therefore, interstate commerce. That the attempt of the defendant The Public Utilities Commission of Ohio to prescribe the price at which the plaintiff shall sell its gas to the defendant Portsmouth Gas Company is an attempt upon the part of said Commission to regulate the plaintiff's business in interstate commerce, in violation of that part of Section 8 of Article 1 of the Constitution of the United States delegating to the Congress of the United States the exclusive power to regulate commerce with foreign nations and among the several States and with the Indian Tribes.

4
The amount in controversy in this suit exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III

That on the 22nd day of October, 1931, the plaintiff entered into a contract with the defendant Portsmouth Gas Company, by which it agreed to sell to said Portsmouth Gas Company, and the said Portsmouth Gas Company agreed to purchase from this plaintiff, the supply of natural gas required by said Portsmouth Gas Company to meet its obligations to its customers in the City of Portsmouth, Ohio, at the price of thirty-seven (37) cents per thousand cubic feet, except for the gas lost in distribution by the said Portsmouth Gas Company only the sum of twenty-five (25) cents per thousand cubic feet should be charged, which said contract is in full force and effect. An office copy of said contract is filed herewith as part of this bill, marked Exhibit "A".

IV

That on the 24th day of February, 1932, the Council of the City of Portsmouth, Ohio, passed an ordinance fixing and prescribing, as a maximum, the following rates for furnishing natural gas service to the citizens, public grounds and buildings of the City of Portsmouth, Ohio, for the duration of the franchise of said Portsmouth Gas Company, to-wit: Forty-five (45) cents per thousand cubic feet, with a discount of five (5) cents per thousand cubic feet if monthly bills are paid within ten days after rendition of the monthly statement by the Portsmouth Gas Company, and a monthly minimum charge of fifty (50) cents; that said rate prescribed by said ordinance was much less than the rate then in effect in said City of Portsmouth; that the [fol. 5] said Portsmouth Gas Company, acting under the laws of the State of Ohio, appealed from said ordinance to the defendant The Public Utilities Commission of Ohio, basing said appeal upon the declaration that the said rate prescribed by said ordinance did not provide it fair compensation for the service rendered by it to the citizens of the City of Portsmouth in the distribution of natural gas to them for the purposes of fuel and light.

V

That on the 16th day of September, 1933, the City of Portsmouth, Ohio, filed its petition in said proceeding pending before The Public Utilities Commission of Ohio upon appeal by said Portsmouth Gas Company from the ordinance fixing gas rates for said City of Portsmouth, as aforesaid, in which said petition the said City of Portsmouth represented, among other things, that the said Portsmouth Gas Company purchased all of its supply of natural gas from this plaintiff, United Fuel Gas Company, under a contract between said two companies, a copy of which was exhibited to said Commission with said petition and which is the same contract filed herewith as Exhibit "A". That the price charged by this plaintiff to said Portsmouth Gas Company was in excess of a fair and reasonable price for said natural gas, and that, because of this fact, the rate charged by said Portsmouth Gas Company was in excess of what would be a fair and reasonable rate, asserting that the defendant The Public Utilities Commission of Ohio had the power, under the statutes of Ohio, to regulate the price which this plaintiff should charge for the natural gas delivered by it to said Portsmouth Gas Company, and praying that this plaintiff be made a party to said proceeding and that the Commission ascertain and fix a rate to be charged by this plaintiff for the natural gas delivered by it to said Portsmouth Gas Company less than that prescribed in said contract. An office copy of said petition is filed herewith as part of this bill, marked Exhibit "B".

[fol. 6] That this plaintiff filed its answer to said motion, in which it denied the right and power of said The Public Utilities Commission of Ohio to fix the price at which it should sell natural gas to said Portsmouth Gas Company, and prayed that it be dismissed from said proceeding, inasmuch as no relief could be granted therein against it. An office copy of said answer is herewith filed as part of this bill, marked Exhibit "C".

That a hearing was had upon the said petition of said City of Portsmouth and said answer and motion of this plaintiff, and on the 18th day of June, 1934, said Commission entered an order declining to dismiss this plaintiff from said proceeding, but retaining it as a party thereto for such lawful orders as the Commission might subse-

quently make against it. A copy of said order is filed herewith as part of this bill, marked Exhibit "D".

That said The Public Utilities Commission of Ohio proceeded to ascertain what would be a fair rate for distributing the natural gas purchased by said Portsmouth Gas Company from this plaintiff to the consumers thereof in said City of Portsmouth, and on the 18th day of April, 1935, said Commission entered an order, in which it found that the rates prescribed for natural gas in the ordinance from which said appeal was taken were manifestly unjust, unreasonable and insufficient, but further found that before it could determine what would be a just and reasonable rate, it would be necessary for it to ascertain what would be a fair price to be charged by this plaintiff to said Portsmouth Gas Company for the natural gas furnished by it to said Portsmouth Gas Company, and required this plaintiff to proceed forthwith and with all diligence to prepare and, within ninety days from the date of said order, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity with the provisions of the General Session Order of the Commission. A copy of said order is herewith filed as part of this bill, marked Exhibit "E".

[fol. 7] That this plaintiff filed before said Commission a petition for rehearing of said order and praying that a rehearing be granted and that said Commission make specific findings of fact upon the evidence introduced before it and specific declarations as to the power claimed by it to fix the price of the natural gas furnished by this plaintiff to the said Portsmouth Gas Company. A copy of said petition is herewith filed as part of this bill, marked Exhibit "F".

That said The Public Utilities Commission of Ohio, on the 29th day of May, 1935, denied the petition for a rehearing asked for by this plaintiff, but supplemented its order of April 18, 1935, by a specific finding, upon the evidence introduced before it, that the natural gas supplied by this plaintiff to said Portsmouth Gas Company was produced in the States of West Virginia and Kentucky and conveyed, together with other gas from the same sources, through a pipe line, in a continuous flow, from

the points of production in West Virginia and Kentucky into the State of Ohio, where the same was delivered to the Portsmouth Gas Company. Said Commission also found that this plaintiff and the said Portsmouth Gas Company has no connection with each other in any way, but were entirely separate and distinct companies. It also found, as a matter of law, that the furnishing of natural gas by this Plaintiff under its contract with the Portsmouth Gas Company was subject to regulation by said Commission, and that the rate to be charged therefor was subject to the jurisdiction of said Commission, and that it had the right to regulate the rate and price to be charged for such service. A copy of said order is herewith filed as part of this bill, marked Exhibit "G".

VI

That as will be seen by reference to the order entered by said Commission on the 29th day of May, 1935, said Commission specifically found that the natural gas furnished by this plaintiff to said Portsmouth Gas Company was produced in the States of Kentucky and West Virginia [fol. 8] and transported from the points of production, in a continuous flow, through pipe lines, to a point in the State of Ohio, where that part of it which was sold to said Portsmouth Gas Company was delivered to it. That other gas from the same pipe line was delivered to a distribution system owned by this plaintiff supplying certain other Ohio towns, and there distributed by it to its customers, but without disturbing or interrupting the continuous flow of gas in said pipe line, either by reduction of the pressure therein or in any other manner, and that there was no connection between this plaintiff and said Portsmouth Gas Company, either directly or by affiliation, that would prevent either of said companies from exercising full discretion in making contracts; and that the said Commission, by its said orders of April 18, 1935, and May 29, 1935, required this plaintiff to show what the cost is to it of supplying said gas to said Portsmouth Gas Company, with the declaration that it (The Public Utilities Commission of Ohio) will fix the rate which this plaintiff shall charge said Portsmouth Gas Company for said gas, claiming that it has the right to regulate said price under the laws of the State of Ohio.

Plaintiff avers, as fully appears from the facts above stated, that the transaction between it and the said Portsmouth Gas Company is entirely in interstate commerce; that the power and jurisdiction assumed by said The Public Utilities Commission of Ohio to regulate the price at which this plaintiff shall sell its gas to said Portsmouth Gas Company in interstate commerce is a regulation of interstate commerce and is in violation of that part of Section 8 of Article 1 of the Constitution of the United States conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes.

Plaintiff says that the orders of said The Public Utilities Commission of Ohio, above referred to, and the statute law of the State of Ohio upon which the same are based, [fol. 9] which attempt to abrogate the contract entered into by it with the said Portsmouth Gas Company, are each and all null and void and in violation of that part of Section 10 of Article 1 of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts; that the effect of said statute of the State of Ohio, as construed by the Public Utilities Commission of Ohio in said orders, is not only to impair, but to entirely abrogate the contract existing between this plaintiff and the said Portsmouth Gas Company; and that the statute upon which said The Public Utilities Commission of Ohio relies as the basis for said orders was passed by the General Assembly of the State of Ohio on the 10th day of April, 1933, long after the making of the contract between this plaintiff and the defendant Portsmouth Gas Company involved in this case.

Plaintiff says that its interest in the said contract between it and the said Portsmouth Gas Company is a property right and constitutes property of the said plaintiff; that the action of the said defendant The Public Utilities Commission of Ohio in abrogating said contract destroys said property right and takes plaintiff's valuable property from it without due process of law and denies to it the equal protection of the laws, and is in violation of Section 1 of the Fourteenth Article of Amendment of the Constitution of the United States.

That to comply with said orders of said Commission would entail upon this plaintiff the expenditure of a very large sum of money in making inventories and appraisals

of its property; that its property consists of a large producing gas plant, containing many miles of pipe line, many compressor stations, more than two thousand producing gas wells, and other equipment and appurtenances necessary and proper for the production and marketing of natural gas. That to make an appraisal of said properties as required by said Commission would entail an expense upon this plaintiff of more than One Hundred Thousand Dollars (\$100,000.00).

[fol. 10] That said The Public Utilities Commission of Ohio is without any jurisdiction to make such orders or requirements of this plaintiff; that the statute under which it is acting, giving it such power as construed by it, violates the commerce clause of the Constitution of the United States, above referred to, and that the expenditure of said large sum of money by this plaintiff in complying with said orders would impose a burden upon it without any way of recouping itself for such expenditure; that by the laws of the State of Ohio, every public utility is required to observe and comply with every order, direction and requirement of said Commission made under the authority of the laws of the State of Ohio, and that any public utility which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of said Commission shall forfeit and pay to the State not to exceed One Thousand Dollars for each such failure, omission or neglect, and each day's continuance thereof shall be deemed and held a separate offense; and that any officer, agent or employee of any public utility who fails, omits or neglects to obey, observe or comply with any lawful order or direction of said Commission shall be fined not less than One Hundred Dollars nor more than One Thousand Dollars, or imprisoned not more than two years, or both, and each day's continuance of such failure, omission or neglect shall constitute a separate offense.

That the defendant John W. Bricker, as Attorney General of the State of Ohio, and the defendant Donald C. Power, as Special Counsel for The Public Utilities Commission of the State of Ohio, are charged with seeing that the laws and orders of said Commission are carried out, and that unless this plaintiff shall proceed forthwith to furnish an inventory and appraisal of its property as required by the order of said Commission, at the enormous expense hereinbefore stated, they (the said John W.

Bricker, Attorney General, and the said Donald C. Power, Special Counsel for said Commission) will proceed to enforce against this plaintiff the penalties provided for, as above indicated, and against its officers and employees the penal provisions of said statute.

That this plaintiff, if it carries out the provisions of said orders, will be irremediably injured and damaged to [fol. 11] the extent that it will require the expenditure of the large sum of at least One Hundred Thousand Dollars (\$100,000.00) in carrying out the same, or if it refuses to carry out said orders, it will subject itself to the attempt of said public officers of the State of Ohio to enforce against it and against its officers, agents and employees the penalties above referred to, so that, in any event, unless it is granted relief herein, it will suffer irremediable injury and damage by reason of the promulgation of the said orders of said The Public Utilities Commission of Ohio.

That in addition to the foregoing penal provisions, said The Public Utilities Commission of Ohio has promulgated certain rules and regulations, among others, one providing that if, in the judgment of the Commission, a party fails to use due diligence in the preparation of or in the conduct of a hearing, the Commission may, after due investigation, dismiss or sustain the appeal, approve or disapprove the proposed rate, or take such other action as in its judgment may be appropriate. This plaintiff says that unless it is granted relief against the said orders of said The Public Utilities Commission of Ohio, said Commission may, under the said rule, proceed in a summary way to fix the rate which this plaintiff shall charge to said Portsmouth Gas Company, and thereby inflict upon this plaintiff irremediable injury and damage.

VII

This plaintiff says that the action of said The Public Utilities Commission of Ohio in entering its order of April 18, 1935, and its order of May 29, 1935, requiring this plaintiff to submit the valuation of its property to said Commission for the purpose of fixing the rate which it shall charge to said Portsmouth Gas Company, is entirely void; that the said provision of the law of the State of Ohio, as construed by said Commission, attempting to confer upon it the power to regulate the price at which this plaintiff shall sell its natural gas in interstate commerce, is

beyond the power of the Legislature of the State of Ohio or The Public Utilities Commission of Ohio, and is in violation of that part of Section 8 of Article 1 of the Constitution of the United States conferring upon the Congress of the [fol. 12] United States the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes. That this plaintiff will be irreparably injured and damaged unless said The Public Utilities Commission of Ohio; said John W. Bricker, Attorney General of the State of Ohio, and the said Donald C. Power, Special Counsel for said Commission, are enjoined, inhibited and restrained from enforcing said orders against this plaintiff or inflicting penalties upon it for failure and refusal to obey said orders; that it is entitled to have such an injunction granted in this case; and that there is, as appears from the allegations hereinbefore made, a controversy between it and said The Public Utilities Commission of Ohio involving the right of said Commission to prescribe the rate which this plaintiff shall charge for the natural gas sold by it in interstate commerce; that it is entitled to have a declaration that the transaction of the sale of natural gas by it to the said Portsmouth Gas Company, involved herein, is interstate commerce, and that the same is not subject to be regulated by said defendant The Public Utilities Commission of Ohio; and that the order of said Commission requiring this plaintiff to submit the valuation and proof of the cost of producing said natural gas and of delivering it to said Portsmouth Gas Company, is null and void under the provisions of the Act of Congress of June 14, 1934, Judicial Code, Section 274-D (28 U. S. C. A., Section 400).

Plaintiff therefore prays:

1. That a writ of subpoena may issue against each of the above named defendants, and that they may be required to answer this bill.

2. That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect.

3. That the said defendant The Public Utilities Commission of Ohio, the members thereof, the said John W. Bricker, Attorney General of the State of Ohio, and the

[fols. 13-14] said Donald C. Power, Special Counsel for said The Public Utilities Commission of Ohio, and each of them, be enjoined, inhibited and restrained from enforcing said orders against this plaintiff, and that the said defendant The Public Utilities Commission of Ohio be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing.

4. That the said defendant The City of Portsmouth, a municipal corporation, be enjoined, inhibited and restrained from ~~from~~ prosecuting any proceeding for the purpose of abrogating or destroying the validity of the said contract between this plaintiff and the said Portsmouth Gas Company; and that a declaration may be made in this suit of the right of this plaintiff to have the performance of the said contract in accordance with its terms, under the provisions of the Act of Congress of June 14, 1934, Judicial Code, Section 274-D (28 U. S. C. A., Section 400).

5. To the end that immediate and irreparable loss, damage and injury may not result to the plaintiff pending the hearing of its motion and prayer for an interlocutory injunction, that a temporary restraining order may be made and entered by this court, inhibiting the said defendants, and each of them, their agents and employees, from enforcing or attempting to enforce said orders of said The Public Utilities Commission of Ohio against the plaintiff or its agents, officers or employees, or from, in any manner interfering with the plaintiff in the performance of the contract between it and the said Portsmouth Gas Company.

United Fuel Gas Company, by H. A. Wallace, President.

Freeman T. Eagleson, Columbus, Ohio; Harold A. Ritz, Charleston, West Virginia, Counsel for Plaintiff.

Duly-sworn to by H. W. Wallace. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO BILL OF COMPLAINT

This Agreement, made this 22nd day of October, 1931, between United Fuel Gas Company, A West Virginia cor-

poration, party of the first part, and Portsmouth Gas Company, an Ohio corporation, party of the second part;

Witnesseth:

Whereas, the said party of the second part is engaged in the business of supplying natural gas to the inhabitants of the City of Portsmouth, in the State of Ohio, and desires to secure a supply of natural gas for said purpose from the party of the first part, and has been securing such supply in the past under a contract which will expire on the 31st day of October, 1931;

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter contained, to be kept and performed by the parties hereto, the said parties mutually agree as follows:

First: United Fuel Gas Company agrees, subject to the qualifications contained in paragraph Second hereof, to furnish to the Portsmouth Gas Company, during the life of this agreement, at the measuring stations at which gas is now being delivered to the said Portsmouth Company by the said United Fuel Company, a sufficient supply of natural gas at all times to meet the requirements of the business of the Portsmouth Company, to be by it distributed and sold to its consumers, and to that end the United Fuel Company will in good faith exercise due diligence to furnish the same, the said United Fuel Company to have the control of the regulator and measuring stations through which said gas is delivered to the said Portsmouth Company.

Second: It is agreed, however, that the obligation of the United Fuel Company at any time to furnish and deliver gas under this contract shall be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the following:

(a) Supplying consumers connected at any time directly to its distributing systems in West Virginia and Ohio;

(b) The performance of a contract for the sale of gas to the Ohio Fuel Supply Company, under which it is now delivering gas to said Company;

(c) The performance of a contract for the sale of gas for use in the City of Cincinnati and in the Cincinnati

District, under which contract it is now delivering gas for that purpose;

(d) The performance of a contract for the sale of gas to the Central Kentucky Natural Gas Company, dated November 1, 1912;

(e) The performance of a contract for the delivery of gas to the Louisville Gas & Electric Company dated July 5, 1913, as modified;

(f) The performance of a contract for the sale of gas to the Hope Natural Gas Company, dated August 25, 1916, as modified;

[fol. 16] (g) The performance of a contract for the delivery of gas to the Pittsburgh & West Virginia Gas Company at Cedarville, in exchange for gas delivered by said Company to the United Fuel Company.

(h) The performance of a contract for the sale of gas to the Warfield Natural Gas Company, dated the 28th day of June, 1923.

Third: The Portsmouth Gas Company agrees to pay to the United Fuel Gas Company for all gas delivered to it as aforesaid during the term of this contract, the price of thirty-seven (37) cents for each one thousand cubic feet, except that for the gas lost in distribution by the said Portsmouth Company only the sum of twenty-five (25) cents per thousand cubic feet shall be charged. The gas lost in distribution as aforesaid shall be determined by a comparison of the quantity of gas delivered to the said Portsmouth Company as shown by the meter readings at the measuring stations where said gas is delivered, with the records of the said Portsmouth Company showing the amount of gas sold by it, and for the purpose of making said comparison, the Portsmouth Company agrees to keep accurate records of all amounts of gas sold by it, and to allow the said United Fuel Company to have access to its books and records for the purpose of making said comparison. It is, however, distinctly understood and agreed that the amount of gas so to be charged for at the rate of twenty-five (25) cents as leakage, shall not in any one year exceed fifty million (50,000,000) cubic feet.

Fourth: The United Fuel Company shall provide proper meter or meters or other measuring devices for the purpose

of measuring the gas delivered under this contract, and such meter or meters or other measuring devices shall be read monthly and statements rendered on the 10th day of each month to the Portsmouth Company for the gas delivered during the preceding month. Such measuring devices shall at all reasonable times be open to inspection and test by the said Portsmouth Company. Should the said Portsmouth Company fail to pay any proper bill rendered for gas delivered under this contract within ten (10) days after the 10th day of the month following that in which the gas was delivered, then in that event, the said United Fuel Company shall have the right to declare this contract forfeited, at its option, and cease to deliver gas hereunder.

Fifth: This contract shall continue in force for the term and period of five (5) years, beginning with the 1st day of November, 1931.

Sixth: The said Portsmouth Company agrees that it will not hold the United Fuel Company liable for any failure in the supply of gas under this contract, provided the said United Fuel Company has used due diligence to prevent such failure.

Seventh: It shall be sufficient, for the purposes of this contract, that all notices to be given and bills to be sent shall be mailed to the Portsmouth Gas Company, at Portsmouth, Ohio, and to the United Fuel Gas Company, at Charleston, West Virginia.

Eighth: Said gas shall be compressed, if necessary, by the United Fuel Company, and the quantity thereof shall be computed on a ten (10) ounce pressure basis above 14.4 pounds atmospheric, according to Boyle's Law for the measurement of gas at varying pressures, and on a temperature basis of forty (40) degrees (F.) flowing and fifty (50) degrees (F.) storage, without further allowance for actual temperatures and barometric conditions.

Ninth: The United Fuel Gas Company hereby expressly reserves to itself and its assigns the right to extract the gasoline and other by-products from said gas before making delivery thereof hereunder.

In Testimony Whereof, the parties hereto have caused their respective corporate names to be hereunto subscribed by their proper officers, respectively, thereunto duly authorized, and their respective corporate seals to be hereunto affixed, all in duplicate.

Portsmouth Gas Company, By Ralph H. Beaton,
President.

Attest: Otis H. Reyer, Secretary.

United Fuel Gas Company, By H. A. Wallace, President.

Attest: F. B. Jesser, Asst. Secretary.

STATE OF OHIO,

County of Franklin; To-wit:

I, Katherine C. Bergin, a Notary Public of said County, do certify that Ralph H. Beaton, who signed the writing hereto annexed for Portsmouth Gas Company, a corporation, bearing date the 22nd day of October, 1931, has this day, in my said County, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 31st day of October, 1931. My commission expires May 6, 1932. Katherine C. Bergin, Notary Public.

STATE OF WEST VIRGINIA,

County of Kanawha, to-wit:

I, J. J. Martin, a Notary Public of said County, do certify that H. A. Wallace, who signed the writing hereto annexed for United Fuel Gas Company, a corporation, bearing date the 22nd day of October, 1931, has this day, in my said County, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 3rd day of November, 1931. My commission expires May 2nd, 1940. J. J. Martin, Notary Public.

[fol. 18] EXHIBIT "B" TO BILL OF COMPLAINT

Before The Public Utilities Commission of Ohio

No. 7750

In the matter of the complaint and appeal of The Portsmouth Gas Company to and from Ordinance Number 8, passed by the City of Portsmouth, Ohio, on February 24, 1932.

Motion of the City of Portsmouth, Ohio, to make the United Fuel and Gas Company a party to this proceeding and to have the Utilities Commission of Ohio inquiry into and determine the legality and reasonableness of the charge for natural gas sold by The United Fuel & Gas Company to the Portsmouth Gas Company of Portsmouth, Ohio for distribution in said city.

The City of Portsmouth, Ohio respectfully makes the following representations in behalf of its motion and application herein:

1. The Portsmouth Gas Company, complainant and appellant herein is a public utility, engaged in the business of distributing to the City of Portsmouth and its inhabitants and industries natural gas. All of which said company purchases from the United Fuel and Gas Company for these expressed purposes.

2. The United Fuel and Gas Company is a corporation and public utility, having various offices and places of business in the State of Ohio. It has for many years and is at present supplying The Portsmouth Gas Company with natural gas for distribution within the City of Portsmouth, and has its principal office and place of business in Scioto County at 202 Ohio Avenue, New Boston, Ohio. It is also engaged in supplying and distributing to consumers in various localities, natural gas as well as supplying and delivering to various other companies in Ohio, natural gas for distribution for heating, lighting and power purposes.

3. The Council of The City of Portsmouth, Ohio on the 24th day of February, 1932, passed Ordinance Number 8, fixing the maximum rate to be charged by The Ports-

mouth Gas Company for distribution of natural gas in said city at forty-five cents (45¢) per thousand cubic feet. Said maximum charge so fixed provided for a reduction of five cents (5¢) per thousand cubic feet if monthly bills were paid within ten days after the same were rendered by said company. Said ordinance further provided for a minimum charge to each customer of fifty cents (50¢) per month where gas so used by the customer did not equal or exceed the amount of fifty cents (50¢) at the rate so fixed by said ordinance.

The said The Portsmouth Gas Company has appealed from such ordinance and has executed and delivered to the Utilities Commission a bond whereby its said rates so fixed by said ordinance have been suspended pending the determination of the justness and reasonableness of the rates so fixed in said ordinance.

[fol. 19] 4. The said The Portsmouth Gas Company has for some time and is now purchasing its natural gas, for supply and distribution within the City of Portsmouth, Ohio, from the United Fuel and Gas Company. The price paid by the said The Portsmouth Gas Company to the United Fuel and Gas Company for gas to be distributed in said city, under an existing contract heretofore filed in these proceedings, constitute a large part of the price charged for gas distributed by The Portsmouth Gas Company to consumers within said city. It is an essential factor in determining in this proceeding the reasonableness of the maximum rates fixed by Ordinance Number 8, passed February 24, 1932, herein referred to or for any other rates being now charged to consumers within the City of Portsmouth, Ohio.

5. The rates heretofore or now paid by The Portsmouth Gas Company for natural gas distributed by it in the City of Portsmouth, Ohio are not lawful for the reason that although such rates are collected by The United Fuel and Gas Company and although such company is prohibited by law from collecting any rate for such services until it shall have filed with the Utilities Commission of Ohio its schedule and had the same approved by said Commission. Nevertheless The United Fuel and Gas Company has not filed any such rates with this Commission nor at any time sought or had the approval thereof, nor any determina-

tion of the justness or reasonableness of the rates so charged.

6. Furthermore, The Portsmouth Gas Company under date of October 22nd, 1931, entered into an unreasonable written contract with The United Fuel and Gas Company without any approval of The Utilities Commission of Ohio. Said contract was to continue in force and effect for a period of five years from the date thereof and provided for the payment of thirty-seven cents (37¢) per thousand cubic feet for gas delivered at the gate of the city and for distribution by said The Portsmouth Gas Company. Said price so fixed in said contract is exorbitant and is reflected in the retail price charged by The Portsmouth Gas Company to the consumers of said city.

A copy of said contract and agreement is hereto attached marked "exhibit A" for the information of this Commission.

7. The charges so specified in the agreement referred to in Section 6 and made a part hereof are substantially in excess of charges heretofore approved by this Commission and based on the cost of production and delivery of gas in this locality either for wholesale or distribution, that they are exorbitant, unreasonable, discriminatory and result in the consumer being forced to pay an unreasonable rate for gas distributed.

8. The agreement herein referred to in Section 6 between The Portsmouth Gas Company and The United Fuel and Gas Company fixed the gate rate without the approval of this Commission, disregards and evades the jurisdiction of this Commission and the laws of the State of Ohio, limiting public utilities to reasonable compensation for services rendered by them. The conditions of said contract now being enforced by the United Fuel and Gas Company fixed the cost of gas at the gate of said city in substance increases unreasonably the distribution cost of gas within the city of Portsmouth.

9. This agreement, if binding upon The Portsmouth Gas Company, would permit The United Fuel and Gas Company through The Portsmouth Gas Company as agent and a medium for collection to indirectly charge to the consumers of Portsmouth an unreasonably high rate for [fol. 20] natural gas service, and to discriminate against

said city and its inhabitants in its charges for natural gas as compared with those charged in other municipalities of Ohio. This arbitrarily limits and destroys, by mere contract between distributing and wholesale utilities, any power of this Commission to establish reasonable rates for public utilities' service. It further prohibits the city from regulating prices which utility companies may charge in said city. It further allows and permits the said The United Fuel and Gas Company and the distributing company, purchasing from it, to remove themselves from the jurisdiction of The Utilities Commission or the laws of Ohio and to impose on the general public any rates they might care to charge and fix by contract between them.

10. The Portsmouth Gas Company by signing this agreement with The United Fuel and Gas Company and its failure to take any action before the court or elsewhere has become a party to the imposing on the consumers of Portsmouth this unreasonable and high rate charged for natural gas distributed to the consumers within said city. Said The Portsmouth Gas Company will continue to pay The United Fuel and Gas Company this unreasonable high rate for natural gas and the same will continue to be reflected in the retail rate charged to consumers of said city.

11. If this Commission fails to determine the unreasonableness of the charge as provided for in the now existing contract between The Portsmouth Gas Company and The United Fuel Gas Company it will be unable to reach a final, complete or lawful determination of the reasonableness of the rates fixed in Ordinance Number 8, passed by the City of Portsmouth, Ohio, February 24th, 1932, or any other rate being now charged by the Portsmouth Gas Company for services within said city.

12. The United Fuel and Gas Company is in possession of all facts pertinent to the determination of the reasonableness of the rate it is charging The Portsmouth Gas Company, and if it be made a party hereto and required to produce such records and facts, both companies involved will have an opportunity to be heard on the unreasonableness of both the gate rate and the distribution rate and without further delay or inconvenience to the parties hereto,

this Commission could fix a reasonable gate and distribution charge.

There is also pending before this Commission a separate complaint filed by The City of Portsmouth and Joseph L. Kountz against The United Fuel and Gas Company, and against The Portsmouth Gas Company complaining that the rate being charged by The United Fuel and Gas Company to the Portsmouth Gas Company is unreasonable and discriminatory. The determination of the unreasonableness of Ordinance Number 8 in this proceeding is based partly upon the unreasonableness of the charge to be paid by The Portsmouth Gas Company for gas to be re-sold by it to the City of Portsmouth and its consumers, and will therefore raise and dispose of many of the same issues as will be material in this case.

WHEREFORE, The City of Portsmouth moves and prays this Commission to issue the following order:

I. That The Portsmouth Gas Company establish in this case the legality of the price payable by it to The United Fuel and Gas Company or any other company from which it directly or indirectly purchases natural gas.

II. That the said The Portsmouth Gas Company establish in this case a purchase price payable by it for natural gas to The United Fuel and Gas Company which conforms to some lawful rate charged by The United Fuel and Gas Company on file with and approved by this Commission [fol. 21] or that The Portsmouth Gas Company establish the reasonableness of the charge for natural gas paid to The United Fuel and Gas Company.

III. That The United Fuel and Gas Company be made a party to this proceeding.

IV. That The United Fuel and Gas Company be required to file with this Commission and obtain the approval or the determination by this Commission of the justness and reasonableness of any rate for natural gas sold and delivered to The Portsmouth Gas Company or to be sold and delivered to it for the sale and distribution by said The Portsmouth Gas Company within the limits of the City of Portsmouth, Ohio.

V. That any complaint pending before this Commission against rates charged by The United Fuel and Gas Company to The Portsmouth Gas Company for natural gas distributed in the City of Portsmouth, Ohio, by The Portsmouth Gas Company or to the inhabitants of said city be consolidated with this proceeding in order that the evidence and legal arguments presented in this proceeding shall also be deemed to have been presented in that case.

VI. That such investigation be made, on the initiative of this Commission or otherwise, as is necessary or just in the premises so that this Commission shall ascertain fully and promptly the lawful rates to be paid by The Portsmouth Gas Company to The United Fuel and Gas Company for natural gas for distribution in the City of Portsmouth or to the inhabitants of said city, and so as to require conformity to all such orders as shall be issued by this Commission.

Respectfully submitted,

(S.) W. L. Dickey, Director of Law of the City of Portsmouth, Ohio.

(NOTE: The contract and agreement filed as "Exhibit A" with the foregoing motion is the same as Exhibit "A" filed with the bill of complaint herein, and is therefore omitted from this print.)

[fol. 22] EXHIBIT "C" TO BILL OF COMPLAINT

No. 7750

Before The Public Utilities Commission of Ohio

In the matter of the complaint and appeal of the Portsmouth Gas Company to and from Ordinance No. 8, passed by the City of Portsmouth, Ohio, on February 24, 1932

Motion of the City of Portsmouth, Ohio, to make United Fuel Gas Company a party to said proceeding

The answer of United Fuel Gas Company to the motion filed in the above proceeding, having for its purpose making it a party thereto and prescribing the rate to be charged

by it for natural gas delivered and to be delivered by it to the said Portsmouth Gas Company.

This respondent, for answer to said motion, says:

1. That it is true that the Portsmouth Gas Company is a public utility engaged in the business of distributing natural gas to the inhabitants of the City of Portsmouth, and that it is true that said gas is purchased by the said Portsmouth Gas Company from this respondent.

2. That it is true that this respondent has been, for many years, supplying the Portsmouth Gas Company with natural gas for distribution within the City of Portsmouth, but this respondent has no principal office in Scioto County, Ohio, as stated in the second paragraph of said motion. That it is true that it does distribute some natural gas to some domestic consumers in New Boston and Ironton, Ohio, but the business of supplying these consumers has no connection with the sales of natural gas to the said Portsmouth Gas Company.

3. This respondent is advised that it is true that the Common Council of the City of Portsmouth, on the 24th day of February, 1932, passed Ordinance No. 8, prescribing the rates for natural gas mentioned in paragraph three of said motion; and it is likewise true, as this respondent is advised, that the said Portsmouth Gas Company has appealed from said ordinance and executed a bond, under which it is collecting the rates in effect at the time of and prior to the passage of said ordinance.

4. That it is true, as hereinbefore stated, that the said Portsmouth Gas Company purchases the natural gas delivered by it to its consumers from this respondent, and that said gas is purchased under a contract entered into between the said Portsmouth Gas Company and this respondent; and that it is likewise true, as must be self-evident, that the price paid for said gas is a material part of the charge made by said Portsmouth Gas Company to its consumers.

5. This respondent denies that there is any requirement of any law of the state of Ohio imposing upon it the obligation to file any schedule of rates covering the sales and deliveries of gas by it to the said Portsmouth Gas Company. It says that the gas sold and delivered by it to said Portsmouth Gas Company is in pursuance of a contract

entered into by it as set up in the motion herein, and that prior to the making of this contract there was another contract which had expired by its terms; that all of said gas is produced or purchased by this respondent in the States of Kentucky and West Virginia, and is transported by it through transmission lines, under high pressure, to and [fol. 23] across the Ohio River at the City of Portsmouth and delivered to the said Portsmouth Gas Company out of its high pressure lines at said point; that said natural gas at no time comes to rest while in the custody or possession of this respondent in the State of Ohio; that the same, therefore, constitutes interstate commerce, and that all of the transaction in regard thereto are dealings in interstate commerce; and that no law of the State of Ohio, properly construed, attempts to prescribe rates or authorize any tribunal of the State of Ohio to prescribe rates for such dealings in such interstate commerce, and that if any law did so authorize the Public Utilities Commission of Ohio, or any other tribunal, to regulate or fix rates for such business, the same would be invalid and of no effect and in violation of the commerce clause of the Constitution of the United States.

It is true, therefore, that this respondent has filed no schedule of rates covering the business done by it with the said Portsmouth Gas Company, for the reason that there is no law of the State of Ohio requiring that the same be filed.

6. It is true, as alleged in the sixth paragraph of said motion, that this respondent entered into a contract with the Portsmouth Gas Company for the sale of gas to it (the said Portsmouth Gas Company), but it denies emphatically that said contract is unreasonable. On the contrary, it says that the said contract was made by it and the said Portsmouth Gas Company after mature and full negotiation, and this respondent avers that said contract is in all respects fair and reasonable. It is true that it has not secured the approval of the Public Utilities Commission of Ohio of said contract; that, as before stated there is no law of the State of Ohio that confers upon the Public Utilities Commission of Ohio the power to regulate the interstate commerce engaged in by this defendant as aforesaid, and if the statutes of the State of Ohio can be construed and are construed as requiring the approval of such contracts by the Public Utilities Commission of Ohio and as

conferring upon the Public Utilities Commission of Ohio the power to regulate the price of the gas delivered in interstate commerce by this respondent to the said Portsmouth Gas Company, then such statutes are invalid and of no force and effect and violate the commerce clause of the Constitution of the United States.

7. This respondent denies that the said charges made by it for natural gas to the said Portsmouth Gas Company are exorbitant, unreasonable or extortionate, and denies that the same are in excess of charges made under similar circumstances for like quantities of such natural gas.

8. This respondent denies that it has attempted to evade or is evading compliance with any laws of the said State of Ohio. It says that the Public Utilities Commission of Ohio, as before stated, has no jurisdiction to prescribe rates at which it shall sell its natural gas in interstate commerce, for the reason that the transactions between it and the said Portsmouth Gas Company are not subject to regulation by said Public Utilities Commission.

9. This respondent denies that the said Portsmouth Gas Company is in the remotest sense a medium or agent of this respondent for the collection of money from the citizens of the City of Portsmouth. It avers that the transactions between it and the said Portsmouth Gas Company are free from any fraud or collusion or of any purpose upon its part or upon part of the said Portsmouth Gas Company to do [fol. 24] otherwise, in so far as the said Portsmouth Gas Company is concerned, than to secure a supply of gas for its consumers at the very best price at which the same can be secured. It denies that the said contract between it and the said Portsmouth Gas Company in any way abridges or denies the right of the Public Utilities Commission of Ohio to regulate the rates of public utilities. It denies that said contract permits the Portsmouth Gas Company and this respondent, or either of them, to impose upon the citizens of Portsmouth any rates which they may see fit. On the contrary, it says that the Public Utilities Commission of Ohio has plenary power to regulate the rates and charges which the said Portsmouth Gas Company may make to its consumers of natural gas.

10. It denies that this respondent or the said Portsmouth Gas Company are making any unreasonable charge against

the consumers of the City of Portsmouth by reason of said purchase or the failure to submit said contract for the approval of the Public Utilities Commission. It says that it believes it is true that the said Portsmouth Gas Company will continue to pay for the said gas the rate prescribed in said contract, and that it is the intention of this respondent to insist upon the performance of said contract in accordance with its terms.

11. This respondent denies that the Public Utilities Commission of Ohio is unable to determine correct and proper rates for natural gas service in the City of Portsmouth by reason of said contract, or that the said sale and delivery of said gas by this respondent to the said Portsmouth Gas Company in interstate commerce, as aforesaid, is any impediment to the said Public Utilities Commission in the performance of its duty in the State of Ohio.

12. This respondent denies that the Public Utilities Commission of Ohio is given by law any power or jurisdiction to determine at what price this respondent shall sell gas to the said Portsmouth Gas Company, and it avers that if the statutes of the State of Ohio attempt to confer such power, then said statutes and laws so attempting to confer such power are invalid and of no effect, because the same violate the commerce clause of the Constitution of the United States conferring upon the Congress of the United States the exclusive power to regulate interstate commerce.

13. This respondent denies the power or right of said Public Utilities Commission of Ohio to regulate the contract price at which gas shall be sold by this respondent to the said Portsmouth Gas Company. It submits that the said transaction constitutes and is interstate commerce, and that the regulation thereof is exclusively vested in the Congress of the United States by the Constitution of the United States; that no law of the State of Ohio attempts to confer this power upon the Public Utilities Commission of Ohio, when the same is properly construed; that if any statute or law of the State of Ohio is construed as attempting to confer such power, the same, to that extent, is invalid and void as violating the commerce clause of Constitution of the United States conferring exclusive power upon the Congress of the United States to regulate such commerce.

This respondent says that it should be dismissed from this proceeding and allowed to conduct its business with the said Portsmouth Gas Company under the contract aforesaid and under such regulations as may be properly made by competent authority.

United Fuel Gas Company, By Harold A. Ritz, General Counsel.

Freeman T. Eagleson, Harold A. Ritz, Attorneys.

[fol. 25] EXHIBIT "D" TO BILL OF COMPLAINT

No. 7750

Before the Public Utilities Commission of Ohio

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio"

This day after full argument by counsel, this matter came on for consideration upon the motion of the City of Portsmouth, filed September 16, 1933, and the motion embodied in the answer of The United Fuel Gas Company to be dismissed as a party to this proceeding.

The Commission, being fully advised in the premises, and coming first to consider said motion of said City of Portsmouth, finds that the said motion, insofar as it asks

That the said The Portsmouth Gas Company establish in this case a purchase price payable by it for natural gas to The United Fuel Gas Company which conforms to some lawful rate charged by The United Fuel Gas Company on file with and approved by this Commission;

That the United Fuel Gas Company be required to file with this Commission and obtain the approval or the determination by this Commission of the justness and reasonableness of any rate for natural gas sold and delivered to The Portsmouth Gas Company or to be sold and delivered to it for the sale and distribution by said The Portsmouth

Gas Company within the limits of the City of Portsmouth, Ohio;

That any complaint pending before this Commission against rates charged by The United Fuel Gas Company to The Portsmouth Gas Company for natural gas distributed in the City of Portsmouth, Ohio, by The Portsmouth Gas Company or to the inhabitants of said city be consolidated with this proceeding in order that the evidence and legal arguments presented in this proceeding shall also be deemed to have been presented in that case, and

That such investigation be made, on the initiative of this Commission or otherwise, as is necessary or just in the premises so that this Commission shall ascertain fully and promptly the lawful rates to be paid by The Portsmouth Gas Company to The United Fuel Gas Company for natural gas for distribution in the City of Portsmouth or to the inhabitants of said city, and so as to require conformity to all such orders as shall be issued by this Commission, should be, and hereby the same is overruled.

To which action of the Commission in overruling certain portions of its motion, the City of Portsmouth, Ohio, then excepted, here now excepts and its exceptions here are noted of record.

And the Commission coming now to consider said motion in the following respects, finds that the said motion, insofar as it asks

That The Portsmouth Gas Company establish in this case the legality of the price payable by it to The United Fuel [fol. 26] Gas Company or any other company from which it directly or indirectly purchases natural gas;

That The Portsmouth Gas Company establish the reasonableness of the charge for natural gas paid to The United Fuel Gas Company, and

That the United Fuel Gas Company be made a party to this proceeding,

should be, and hereby the same is sustained.

To which action of the Commission in sustaining said motion in said respects, said The Portsmouth Gas Company and said The United Fuel Gas Company each then excepted, here now except, and their exceptions here are noted of record.

It is, therefore,

Ordered, That said The United Fuel Gas Company be, and hereby it is made a party to this proceeding and sub-

jected to the jurisdiction of this Commission in all matters which may legally arise herein. It is, further

Ordered, That said The United Fuel Gas Company be, and hereby it is notified, directed and required within ten days herefrom to file with this Commission a copy of the articles of agreement or contract by and with The Portsmouth Gas Company whereunder it is supplying said The Portsmouth Gas Company natural gas for distribution in the City of Portsmouth, Ohio.

To which order of the Commission, said The United Fuel Gas Company then excepted, here now excepts, and its exceptions here are noted of record.

The Commission coming now to consider the said motion of said The United Fuel Gas Company to be dismissed as a party to this proceeding finds that said motion is not well taken upon any ground thereof and does overrule the same upon each and every ground.

To which action of the Commission in overruling its said motion to be dismissed as a party to this proceeding, said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, ———,
Chairman, Frank W. Geiger, Charles F. Schaber,
Commissioner.

Dated at Columbus, Ohio, this 18th day of June, 1934.

Chairman E. J. Hopple does not concur.

A True Copy:

C. H. Knisley, Secretary.

[fol. 27] EXHIBIT "E" TO BILL OF COMPLAINT

Before The Public Utilities Commission of Ohio

No. 7750

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after full hearing and argument by counsel, this matter came on for consideration upon the complaint and appeal by The Portsmouth Gas Company from the Ordinance passed February 24, 1932, by the Council of the City of Portsmouth, Ohio, fixing and prescribing as maxima the following rates for the furnishing of natural gas service to the citizens, public grounds and buildings of the City of Portsmouth, Ohio for the duration of the franchise of said The Portsmouth Gas Company passed June 21, 1899, to wit:

45¢ per 1,000 cubic feet with a discount of 5¢ per 1,000 cubic feet, if bills are paid within ten days after the rendition of the monthly statement by the gas company.

Monthly minimum charge 50 cents

and the testimony and exhibits offered and introduced in evidence upon such hearing and the argument of counsel.

The appellant elected to and under an undertaking duly filed herein has charged during the pendency of this proceeding the following schedule of rates which was in effect immediately prior to the effective date of the ordinance complained of and appealed from:

First 1,000 cu. ft. or less per month	85¢
Over 1,000 cu. ft. per month	60¢ per M cu. ft.
Discount for prompt payment	5¢ per M cu. ft.

The appellant produces no gas and purchases from the United Fuel Gas Company all of the gas which it distributes under a contract which, with an adjustment for leakage, prescribes a price of 37 cents per 1,000 cubic feet.

By order, made and entered in this proceeding on June 18, 1934, the said United Fuel Gas Company was made a party and directed to file a copy of the contract whereunder it supplies gas to the appellant. No proceeding was instituted seeking a reversal of this order.

The appellant, The Portsmouth Gas Company, offer in evidence its record tending to show that the cost of rendering service in the City of Portsmouth, exclusive of cost of purchasing gas, taxes and the necessary allowance for depreciation, for the fiscal years ended February 29, 1932, and February 28, 1933 was as follows:

[Vol. 28]	1932	1933
Transmission and Distribution:		
Operation.....	\$15,492.04	\$16,359.16
Maintenance.....	36,147.50	19,900.51
Commercial Expense.....	19,199.85	19,077.12
New Business Expense.....	16,416.77	10,394.05
General Expense:		
Operation.....	46,628.43	41,948.81
Maintenance.....	1,372.45	1,246.02
	<u>\$135,257.04</u>	<u>\$108,925.67</u>

The United Fuel Gas Company has presented no evidence tending to show the cost of supplying gas wholesale to The Portsmouth Gas Company.

The Commission coming first to determine the valuation of the property of the Appellant, The Portsmouth Gas Company, actually used and useful, for the furnishing of natural gas service, by said company, to consumers and to the public in the City of Portsmouth, Ohio, and after considering the evidence and exhibits offered at said hearing, and having completed an independent inventory and valuation of said property, and being fully advised in the premises, finds and ascertains the value of the several kinds and classes of the property of The Portsmouth Gas Company used and useful for the convenience of the public and for the natural gas service to its consumers and to the public in the City of Portsmouth, Ohio, and of said property as a whole, as of February 24, 1932, to be as set forth in the following summary, (the grand totals

of which are reproduction costs \$761,939; depreciation \$94,151, and present value \$667,788.) viz:

	Repro- duction Cost New	Depreci- ation	Present Value
District Regulator Structures	\$1,268.00	\$175.00	\$1,093.00
Gas Receivers & District Regulators	5,647.00	918.00	4,729.00
Distribution Line Equipment	359,498.00	49,667.00	309,831.00
Service Line Equipment	151,201.00	17,237.00	133,964.00
Meters	93,064.00	13,893.00	79,171.00
Meter Installations	15,884.00	2,353.00	13,531.00
General Office Land	13,073.00	0.00	13,073.00
Other General Land	5,178.00	0.00	5,178.00
General Office Structures	40,177.00	2,348.00	37,829.00
General Office Equipment	6,723.00	823.00	5,900.00
General Store & Shop Equipment	595.00	76.00	519.00
General Garage Equipment	2,129.00	1,202.00	927.00
General Tools & Implements	841.00	210.00	631.00
Other General Equipment	540.00	0.00	540.00
General Overheads	31,992.00	5,249.00	26,743.00
Working Capital & Material and Sup- plies	34,129.00	0.00	34,129.00
Total	\$761,939.00	\$94,151.00	\$667,788.00

[fol. 29] And the Commission, coming now to consider the said complaint and appeal of The Portsmouth Gas Company of and from the said ordinance, passed by the Council of the City of Portsmouth, Ohio, on February 24, 1932, fixing and prescribing the maximum prices to be charged for natural gas service for public and private consumption in the City of Portsmouth, Ohio, being fully advised in the premises, and having caused an appraisement to be made and having ascertained and hereinbefore determined and fixed the value of all of the property of said company actually used and useful for the convenience of the public in the furnishing of natural gas for public and private consumption in the said City of Portsmouth, Ohio, excluding therefrom the value of any franchise or right to own, operate or enjoy the same (exclusive of any tax or annual charge actually paid to any political subdivision of the state or county) as a consideration for the grant of such franchise or right, and exclusive of any value added thereto by reason of a monopoly or merger, and having given consideration to the necessity of making reservations from income for surplus, depreciation and contingencies, and having taken into consideration all other matters which were deemed proper, further finds:

That the following adjustments by the elimination of improper System Charges and the equalization of Mainte-

nance Expenses are necessary to determine the actual operating expenses, exclusive of cost of purchased gas, taxes and allowance for depreciation, to determine the cost of the rendering of the service of The Portsmouth Gas Company for the fiscal years ended February 29, 1932, and February 28, 1933, respectively.

	1932	1933
Transmission and Distribution:		
Operation	\$30.04*	\$121.72*
Maintenance	3,716.56*	6,071.94
Commercial Expense	14.92*	15.56*
New Business Expense	239.96*	223.69*
General Expense:		
Operation	20,546.53*	18,957.15*
	<u>\$24,548.01*</u>	<u>\$13,246.18*</u>

(*Figure in red.)

That the said City of Portsmouth, Ohio and the appellant, The Portsmouth Gas Company have agreed that there shall be allowed the appellant herein an earning or return of $6\frac{1}{2}$ per centum per annum upon the valuation herein found by the Commission to be the proper rate base;

That a reasonable annual depreciation allowance to be herein made to said The Portsmouth Gas Company shall be a sum equivalent to one and one-half per centum of the value of its depreciable property;

That, adjusted by the Commission as aforesaid, the actual operating expense of the appellant (exclusive of the cost of purchased gas) for the furnishing of its service in [fol. 30] the City of Portsmouth, for the aforesaid fiscal periods, and with the proper allowance for taxes, depreciation and return, is as follows, to-wit:

	1932	1933
Transmission and Distribution:		
Operation	\$15,462.00	\$16,237.44
Maintenance	32,400.90	25,972.45
Commercial Expense	19,184.93	19,061.56
New Business Expense	16,176.81	10,170.36
General Expense:		
Operation	26,081.90	22,991.66
Maintenance	1,372.45	1,246.02
	<u>\$110,709.03</u>	<u>\$95,679.49</u>
Taxes	20,015.39	20,015.39
Depreciation	9,231.13	9,231.13
Return	43,406.24	43,406.24
	<u>\$184,019.15</u>	<u>\$169,918.25</u>

That, for the same fiscal periods, the actual revenues of The Portsmouth Gas Company at the schedule of rates which it has collected under the undertaking duly given herein, were the sums of \$459,560.01 and \$413,035.16, respectively, from which were available, after the payment of the aforesaid operating expenses, taxes, depreciation charges and return, the respective sums of \$276,198.22 and \$244,702.91 for the purchase of gas, or a rate of 33 cents per 1,000 cubic feet:

That, for the same fiscal periods, the revenues of The Portsmouth Gas Company at the schedule of rates fixed and prescribed by said ordinance, would have been the sums of \$305,648.00 and \$275,130.80, respectively, from which, with the same deductions, would have been available for purchase of gas the respective sums of \$121,628.85 and \$105,918.23, or a rate of 14.36 cents per 1,000 cubic feet, and

That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust, unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor.

The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission.

[fol. 31] The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety

days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. It is, further,

Ordered, That this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises.

The Public Utilities Commission of Ohio.

E. J. Hopple, Chairman. Charles F. Schaber, R. D. Williams, Commissioners.

Dated at Columbus, Ohio, this 18th day of April, 1935.

A true copy: /s/ C. H. Knisley, Secretary.

[fol. 32]. EXHIBIT "F" TO BILL OF COMPLAINT

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7750

In the Matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company; a corporation distributing natural gas in the City of Portsmouth, Ohio."

PETITION FOR REHEARING

To the Public Utilities Commission of Ohio:

The undersigned, United Fuel Gas Company, respectfully prays for a rehearing of the order of the Commission entered on the 18th day of April, 1935, in which among other things, it is provided that the natural gas supplied by the United Fuel Gas Company to the Portsmouth Gas Company

for resale to consumers in the City of Portsmouth, is furnished as a public utility within the meaning of Section 614-2 of the General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission, and requiring the undersigned to proceed with all due diligence to prepare and present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged to the Portsmouth Gas Company by it for the furnishing of such natural gas.

This petitioner prays that it may have a rehearing of said order, and it also prays that upon said rehearing the said Commission will make specific findings of fact, under the evidence introduced in this case, as follows:

First. That the gas sold by this petitioner to the Portsmouth Gas Company is all produced in the States of West Virginia and Kentucky and is transported by constant flow, through pipe lines, from the said States of West Virginia and Kentucky into the State of Ohio, where it is delivered to the said Portsmouth Gas Company, and is, therefore, interstate commerce.

Second. That this petitioner, United Fuel Gas Company, and the Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest, neither has any associate or parent company of either of said Companies, United Fuel Gas Company and the Portsmouth Gas Company, any such inter-relations, but the said two Companies are entirely separate, distinct and independent of each other and are so operated.

These facts clearly appear from the evidence and are not in any wise disputed, and we submit that the Commission should make specific findings upon these questions, inasmuch as they are the main questions involved in this case.

The undersigned petitioner controverts the right of the Public Utilities Commission of Ohio to prescribe the rate at which petitioner shall furnish gas to the Portsmouth Gas Company under the contract which it has with said [fol. 33] Company, for the reasons heretofore stated in its answer herein. It does not question the right of said Commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for

gas to the consumers in the City of Portsmouth, and it offers to furnish to the Commission such facts and evidence as may be desired, or to permit any officers or agents of the Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said Commission to fix the rates at which petitioner shall sell the gas which it transports into the State of Ohio and delivers to the Portsmouth Gas Company.

Petitioner also says that said Commission should specifically declare, if it is its judgment, that it has or has not power to regulate the price, and that it intends to or does not intend to regulate said price and fix the same, and that it has or has not the right to compel this petitioner to continue to furnish gas to the said Portsmouth Gas Company at such rate as may be fixed by the said Public Utilities Commission of Ohio, and that it intends to compel this petitioner to furnish said gas at such rate as it may prescribe, or that it does not intend to do so.

This petitioner prays that the said order may be reheard, and that the Commission may make specific findings in accordance with the foregoing.

Dated this 14th day of May, 1935.

Respectfully submitted, United Fuel Gas Company,
By Counsel.

Freeman, T. Eagleson, Harold A. Ritz, Counsel for United Fuel Gas Company.

[fol. 34] EXHIBIT "G" TO BILL OF COMPLAINT

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7750

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after due notice to all parties in interest, this matter came on to be heard and was heard upon the applica-

tion of The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings and order made and entered herein upon April eighteenth, 1935, and the argument of counsel.

Whereupon, by stipulation of the parties, the City of Portsmouth, Ohio, and The United Fuel Gas Company, it is,

Ordered, That the findings made and entered herein upon April eighteenth, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to-wit:

That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

[fol. 35] The Commission further finds that the following findings set forth and adopted in said findings as so adopted upon April eighteenth, 1935, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within

the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission."

should be, and hereby the same is modified, amended and supplemented to read as follows, to-wit:

"The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."

The Commission, coming now to consider said application for such rehearing, and being fully advised in the premises, and having hereinbefore, upon the stipulation of said parties, adopted the aforesaid two supplemental findings of fact and amended said findings as aforesaid, finds that sufficient cause has not been made to appear in said application or the argument of counsel for a rehearing upon the said findings, as so supplemented, and the order so made and entered herein as aforesaid. It is, therefore, further,

Ordered, That the said application of said The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings (supplemented as aforesaid) and order made and entered herein upon April eighteenth, 1935, be, and hereby the same is denied.

To which order of the Commission denying its said application for such rehearing, said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, E. J. Hople, Chairman, Charles F. Schaber, R. D. Williams, Commissioners. (Seal.)

Dated at Columbus, Ohio, this 29th day of May, 1935.

A true copy: C. H. Knisley, Secretary.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF PROCESS AND ENTRY OF APPEARANCES BY PUBLIC UTILITIES COMMISSION AND CITY OF PORTSMOUTH—Filed July 10, 1935

The undersigned defendants in the above entitled action respectively waive the issuance of process and service herein upon them and hereby enter appearance.

Dated Wed., July 3, 1935.

The Public Utilities Commission of Ohio, by E. J. Hopple, Chairman. E. J. Hopple, Chairman, The Public Utilities Commission of Ohio. Charles F. Schaber, Member of The Public Utilities Commission of Ohio. Roy D. Williams, Member of The Public Utilities Commission of Ohio. John W. Bricker, Attorney General, State of Ohio. Donald C. Power, Special Counsel for The Public Utilities Commission of Ohio. The City of Portsmouth, by W. L. Dickey, Solicitor of Portsmouth, Ohio. Portsmouth Gas Company, by ———.

[fols. 37-38] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF PROCESS AND ENTRY OF APPEARANCE BY PORTSMOUTH GAS CO.—Filed September 5, 1935

The undersigned defendant, Portsmouth Gas Company, in the above entitled action waives the issuance of process and service herein upon it and hereby enters its appearance.

Portsmouth Gas Company, by (Sig.) John T. Beasley, Attorney.

Dated Wednesday, July 3, 1935, Terre Haute, Indiana.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS, THE PUBLIC UTILITIES COMMISSION OF OHIO, EDWARD J. HOPPLE, CHAIRMAN OF SAID COMMISSION; CHARLES F. SCHABER AND ROY D. WILLIAMS, MEMBERS OF SAID COMMISSION; JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO; DONALD C. POWER, SPECIAL COUNSEL FOR SAID THE PUBLIC UTILITIES COMMISSION OF OHIO—Filed July 30, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

Now comes The Public Utilities Commission of Ohio, Edward J. Hopple, chairman of said commission, Charles F. Schaber and Roy D. Williams, members of said commission, John W. Bricker, attorney general of Ohio and Donald C. Power, special counsel for said The Public Utilities Commission of Ohio and file their answer in the above styled and numbered cause, and for their answer to so much of the bill in the above entitled cause, as these defendants are advised it is necessary for them to make answer unto, say:

1. These answering defendants admit the allegations of [fol. 40] fact stated in paragraph 1 of the bill of complaint.

2. These answering defendants admit the allegations of fact stated in paragraph 2 of the bill of complaint, except that these defendants deny the allegation that the gas produced by United Fuel Gas Company is transported and delivered to the Portsmouth Gas Company without co-mingling the same with any gas produced or purchased in Ohio, and without reducing the pressure at which the same is so transported prior to such delivery, and that said sale and delivery of gas is interstate commerce. These answering defendants further deny that the attempt of the defendant, The Public Utilities Commission of Ohio, to prescribe the price at which United Fuel Gas Company shall sell its gas to the defendant, Portsmouth Gas Company, is an attempt upon the part of said Commission to regulate the United Fuel Gas Company's business in interstate commerce in violation of that part of Section 8 of

Article 1 of the Constitution of the United States, delegating to the Congress of the United States the exclusive power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Defendants aver that United Fuel Gas Company, out of the same pipe line which is used to transport its gas to the Portsmouth Gas Company, delivers certain other gas from the same sources to a distribution system supplying the town of New Boston in the state of Ohio and the city of Ironton in the state of Ohio, and that the distribution of natural gas in said town of New Boston, and the said city of Ironton, is made to the inhabitants of the said municipalities by United Fuel Gas Company through a distribution system owned by United Fuel Gas Company.

3. These answering defendants admit the allegations of fact stated in paragraph 3 of the bill of complaint.

4. These answering defendants admit the allegations of fact stated in paragraph 4 of the bill of complaint.

5. These answering defendants admit the allegations of fact stated in paragraph 5 of the bill of complaint.

6. These answering defendants admit the allegations of fact stated in paragraph 6 of the bill of complaint, except that these defendants deny that gas produced by United Fuel Gas Company and transported by the same pipe line that is used to transport gas to the Portsmouth Gas Company, is distributed by United Fuel Gas Company to its customers in other Ohio towns without disturbing or interrupting the continuous flow of gas in said pipe line, either by reducing the pressure therein or in any other manner; these defendants further deny that the transaction covering the sale of gas from the United Fuel Gas Company to the Portsmouth Gas Company is interstate commerce; these defendants deny that the power and jurisdiction assumed by The Public Utilities Commission of Ohio to regulate the price at which United Fuel Gas Company shall sell its gas to the Portsmouth Gas Company is a regulation of interstate commerce, and deny that it is in violation of that part of Section 8 of Article 1 of the Constitution [fol. 41] of the United States, conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

These defendants further deny that the orders of The Public Utilities Commission of Ohio referred to in the bill of complaint filed herein, and the statute law of the state of Ohio upon which the same are based, are null and void or in violation of that part of Section 10 of Article 1 of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts, or that the effect of said statute of the state of Ohio as construed by the Public Utilities Commission of Ohio in said orders impairs or abrogates any lawful contract existing between United Fuel Gas Company and the Portsmouth Gas Company.

Defendants further deny that the interests of United Fuel Gas Company in said contract with Portsmouth Gas Company is a property right, or that it constitutes property of United Fuel Gas Company, or that the action of the defendant, The Public Utilities Commission of Ohio abrogates or destroys any property right belonging to United Fuel Gas Company, or that it deprives United Fuel Gas Company of any valuable property without due process of law, or that it denies to United Fuel Gas Company the equal protection of the laws or that it is in violation of Section 1 of the Fourteenth Article of Amendment of the Constitution of the United States. These defendants further deny that a compliance with the orders of The Public Utilities Commission of Ohio would entail upon United Fuel Gas Company, the expenditure of a very large sum of money or that such expense would aggregate more than one hundred thousand dollars (\$100,000.00).

These answering defendants further deny the allegations contained in said paragraph 6 of the bill of complaint to the effect that the Public Utilities Commission of Ohio is without any jurisdiction to make the orders complained of or that the statutes under which it is acting violates the commerce clause of the Constitution of the United States, or that the expenditure of any large sum of money would be occasioned thereby. These defendants further deny that United Fuel Gas Company will be irremediably injured and damaged by the carrying out of the orders of The Public Utilities Commission of Ohio complained of, or that United Fuel Gas Company will be damaged to any extent whatever by carrying out said orders.

7. Defendants deny each and every allegation of fact stated in paragraph 7 of the bill of complaint.

Further answering defendants deny each and every allegation of fact stated in the bill of complaint, except insofar as the same are herein expressly admitted.

[fol. 42] Wherefore having fully answered the bill of complaint, these answering defendants pray that the temporary restraining order granted herein on the third day of July, 1935, be vacated, and that the application for an interlocutory injunction be denied, and that upon final consideration, the bill of complaint be dismissed at plaintiff's costs and that these defendants may go hence without day, and for judgment for their costs.

The Public Utilities Commission of Ohio, Edward J. Hopple, Chairman of Said Commission; Charles F. Schaber and Roy D. Williams, Members of Said Commission; John W. Bricker, Attorney General of Ohio; Donald C. Power, Special Counsel for Said The Public Utilities Commission of Ohio, by John W. Bricker, Attorney General of Ohio, Donald C. Power, Attorney for The Public Utilities Commission of Ohio, Solicitors for These Answering Defendants.

Duly sworn to by E. J. Hopple. Jurat omitted in printing.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed September 23, 1935

It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the Court as admissions of the parties in regard thereto; and it is further stipulated that it will cost the plaintiff a substantial sum of money, in excess of three thousand dollars to comply with the commission's order complained of.

United Fuel Gas Company, by H. A. Ritz, Counsel.
The Public Utilities Commission of Ohio, Edward

J. Hopple, Chairman of said Commission, Charles F. Schaber and Roy D. Williams, members thereof; John W. Bricker, Attorney General of the State of Ohio, and Donald C. Power, Special Counsel of said The Public Utilities Commission of Ohio, by Donald C. Power, Their Attorney. The City of Portsmouth, a municipal corporation, by W. L. Dickey, Its Attorney. The Portsmouth Gas Company, by John T. Beasley, Its Attorney.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED BILL OF COMPLAINT—Filed November 20, 1936

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this, its amended bill of complaint, against The Public Utilities Commission of Ohio, Edward J. Hopple, Chairman of said Commission, Charles F. Schaber and Roy D. Williams, members of said Commission, John W. Bricker, Attorney General of the State of Ohio, Donald C. Power, Special Counsel for said The Public Utilities Commission of Ohio, The City of Portsmouth, a municipal corporation, and Portsmouth Gas Company, a corporation, defendants, and respectfully shows:

I

That it has heretofore filed its original bill in this cause, to which it now refers, and asks that all of the allegations, together with the exhibits attached to said original bill, be now considered a part of this, its amended bill.

II

That, as will appear from said original bill, this suit is brought for the purpose of enjoining the enforcement of an order entered by the defendant The Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company, under a con-

tract in existence at the time of the filing of said original bill and at the time of the entry of said order, which is filed as Exhibit "A" with the original bill in this cause; that [fol. 45] since the filing of said original bill, as will appear from an examination of said contract, the same has expired by its own terms—that is to say, on the 1st day of November 1936, while the order of the Public Utilities Commission of Ohio, complained of, asserts the power to require the plaintiff to furnish gas to the defendant Portsmouth Gas Company at such rates as may be prescribed by the defendant The Public Utilities Commission of Ohio, regardless of the contract relations existing between the said plaintiff and the said defendant Portsmouth Gas Company, and the said order, if valid, requires plaintiff to continue furnishing such natural gas at rates to be prescribed by said Commission, regardless of any agreements or arrangements between the said Portsmouth Gas Company and the said plaintiff.

Plaintiff avers, however, that negotiations have been pending between it and the said Portsmouth Gas Company, looking to making a new contract for the supply of natural gas upon the expiration of said old contract; that such negotiations have not been completed, but that, pending the same, the said plaintiff, by its General Counsel, on October 23, 1936, wrote to the President of the Portsmouth Gas Company a letter in words and figures following:

October 23, 1936.

"Mr. Homer V. Armstrong, President
The Portsmouth Gas Company
623 Cherry Street
Terre Haute, Indiana

MY DEAR MR. ARMSTRONG:

In view of the fact that we have not yet succeeded in negotiating a new contract for the supply of natural gas to your Company at Portsmouth after the expiration of the present contract on November 1st, I suggest that we agree that the present contract continue in effect in all its terms for one year from present date of expiration, in order to give us time to conclude the negotiations. If this is satisfactory to you, I will treat your communication in reply to this, expressing that assent, as an extension of the contract.

Yours very truly, (Signed) Harold A. Ritz."

That on October 27, 1936, the President of the said Portsmouth Gas Company replied thereto in words and figures following:

[fol. 46]

October 27, 1936.

"Mr. Harold A. Ritz, General Counsel, United Fuel Gas Company, Charleston, West Virginia.

MY DEAR MR. RITZ:

I have your letter of the 23rd instant calling attention to the fact that the gas supply contract for the Portsmouth Gas Company expires on November 1st, and suggesting that the present contract continue in effect in all of its terms for a period of one year from the present date of expiration.

Considering that our negotiations with your company for a new contract have not been concluded yet, we will agree that the present contract in its entirety be extended for one year from November 1st of this year.

Yours very truly, (Signed) H. V. Armstrong, President.

That by virute of such exchange of letters, the said contract, Exhibit "A" with the bill herein, is still in full force and effect.

Plaintiff reiterates the prayer of the original bill, and prays for all such other, further and general relief as to equity may seem just.

United Fuel Gas Company, by H. A. Wallace, President.

Freeman T. Eagleson, Harold A. Ritz, Attorneys.

Duly sworn to by H. W. Wallace. Jurat omitted in printing.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND AMENDED BILL OF COMPLAINT AND WAIVER OF
SUMMONS—Filed May 8, 1939

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this its second amended bill of complaint against the Public Utilities

Commission of Ohio; George McConnaughey, Chairman of said Commission, Roy D. Williams and Dennis F. Dunlavy, members of said Commission; Thomas Herbert, Attorney General of the State of Ohio, Kenneth L. Sater, Special Counsel for said The Public Utilities Commission, The City of Portsmouth, a municipal corporation, and the Portsmouth Gas Company, a corporation, Defendants, and respectfully shows:

I

That it has heretofore filed its original bill in this cause, as well as its amended bill herein, to which original and amended bills it now refers and asks that all of the allegations thereof, together with the exhibits attached thereto, be now considered a part of this amended bill.

[fol. 48]

II

That, as will appear from said original bill, this suit is brought for the purpose of enjoining the enforcement of an order entered by the defendant The Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company, under a contract in existence at the time of the filing of said original bill and at the time of the entry of said order, which is filed as Exhibit "A" with the original bill in this cause, that the said contract, by its own terms, expired on the 1st day of November, 1936; that it appears from said amended bill that before the expiration of the term of said contract the parties extended the expiration date thereof for one year from the 1st day of November, 1936—that is to say, until the 1st day of November, 1937.

Complainant now avers that before the date of the expiration of said extended term, to-wit, on the 15th day of October, 1937, it and the said Portsmouth Gas Company agreed to an extension thereof for an additional year, until the 1st day of November, 1938, said agreement being consummated by a letter written by complainant's General Counsel to Homer V. Armstrong, President of said Portsmouth Gas Company, dated October 15, 1937, in the following words and figures, to-wit:

“Charleston, W. Va., October 15, 1937.

Mr. Homer V. Armstrong, President, Portsmouth Gas Company, 632 Cherry Street, Terre Haute, Indiana.

DEAR SIR:

The contract for supplying you with natural Gas at Portsmouth, Ohio, as the same was extended by our exchange of letters last October, will expire again on November 1st.

[fol. 49] I wonder if it would not be well to extend the contract for another year from November 1st or until such time as we conclude a new contract.

If you agree with this and will so write me, we will consider that as evidence of the contract.

Very truly yours, (Signed) Harold A. Ritz”.

And by an acceptance of said extension of said agreement by a letter from said Portsmouth Gas Company, by H. V. Armstrong, its President, dated October 27, 1937, in the following words and figures, to-wit:

“Terre Haute, Indiana, October 27, 1937.

Mr. Harold A. Ritz, United Fuel Gas Company, Charleston, W. Va.

DEAR SIR:

I have your letter of the 15th advising me that the one year extension to the gas purchase contract expires again on November 1st.

Considering that we haven't been able to conclude a new contract, we will agree with you to extend the expired contract in all of its terms for another year from November 1st, or until we can conclude a new contract.

Yours very truly, Portsmouth Gas Company,
(Signed) H. V. Armstrong, President.”

That before the expiration of the time to which said contract was extended by the letters aforesaid, to-wit, on the 8th day of October, 1938, complainant's General Counsel wrote a letter to said Portsmouth Gas Company, by Homer V. Armstrong, its President, suggesting the extension of said contract for another year, to-wit, until the 1st day of November, 1939, which letter is in the words and figures following, to-wit:

[fol. 50]

"Charleston, W. Va., October 8, 1938.

Mr. Homer V. Armstrong, President, Portsmouth Gas Company, 632 Cherry Street, Terre Haute, Ind.

MY DEAR MR. ARMSTRONG:

As you know, the contract for supplying your Company with natural gas at Portsmouth, Ohio, as the same was extended by our exchange of letters last October, will expire again on November 1st of this year. I suggest that it would be well to extend this contract for another year from November 1, 1938, or until such time as we conclude a new contract.

If you agree with this suggestion and will so write me, we will consider this letter and your reply thereto as evidence of the contract.

Yours very truly, (Signed) Harold A. Ritz."

And that the said Portsmouth Gas Company, by its said President, H. V. Armstrong, agreed to said extension and the same became binding, by a letter dated October 26, 1938, in the words and figures following, to-wit:

"Terre Haute, Indiana, October 26, 1938.

Mr. Harold A. Ritz, United Fuel Gas Company, Charleston, W. Va.

DEAR SIR:

I have your letter of the 8th advising me that the one year extension to the gas purchase contract expires again on November 1st.

Considering that we haven't been able to conclude a new contract, we will agree with you to extend the expired contract in all of its terms for another year from November 1st, or until we can conclude a new contract.

Yours very truly, Portsmouth Gas Company,
(Signed) H. V. Armstrong, President."

So that complainant says that said contract is now in full force and effect in all of its terms.

[fol. 51]

III

That since the institution of this suit, to-wit, on the 21st day of June, 1938, the Congress of the United States passed an act to control and regulate the business of natural gas

in interstate commerce, known as the "Natural Gas Act", Title 15, USCA, Section 717, etc. By the terms of this act the exclusive power to regulate the business of natural gas in interstate commerce is conferred upon the Federal Power Commission, and if the Public Utilities Commission of Ohio ever had any jurisdiction to regulate the delivery of natural gas by this plaintiff to the said Portsmouth Gas Company, it was deprived of the same by the passage of said "Natural Gas Act."

IV

That since the institution of this suit, Edward J. Hopple, who is named therein as Chairman of the said Public Utilities Commission of Ohio, has ceased to be a member of said Commission, and the defendant George McConnaughey is the successor of the said Edward J. Hopple; that Charles F. Schaber, who is named as one of the Commissioners in said original bill, has ceased to be a member of said Commission, and that the said Dennis F. Dunlavy is now a member of said Commission; that the said John W. Bricker, Attorney General of the State of Ohio, has ceased to be Attorney General of said State, and the said Thomas Herbert is now the duly elected and qualified Attorney General of said State of Ohio; that the said Donald C. Power, named as Special Counsel for said Public Utilities Commission of Ohio in said original bill, has ceased to hold said office, and the said office is now held and being administered by the Defendant Kenneth L. Sater; and that the said George McConnaughey, Dennis F. Dunlavy, Thomas Herbert and Kenneth L. Sater should be substituted as defendants herein in place of the said Edward J. Hopple, Charles F. Schaber, John W. Bricker and Donald C. Power, respectively. [fol. 52]

Plaintiff reiterates the prayer of its original bill, and prays for all such other, further and general relief as to equity may seem just.

United Fuel Gas Company, by H. A. Wallace, President.

Eagleson & Laylin, Harold Ritz, Attorneys.

Duly sworn to by H. A. Wallace. Jurat omitted in printing.

March 19, 1939.

All defendants herein, except Portsmouth Gas Company enter their appearance hereto and waive service of summons hereon.

(Sig.) Kenneth L. Sater, Special Counsel.

Portsmouth Gas Company, by John H. Beasley, Atty.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted].

SUPPLEMENTAL ANSWER OF PUBLIC UTILITIES COMMISSION TO
AMENDED AND SECOND AMENDED BILLS OF COMPLAINT—
Filed April 25, 1939

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

For their supplemental answer to the amended and second amended bills of complaint of The United Fuel Gas Company, defendants, The Public Utilities Commission of Ohio; George McConaughy, Chairman of said Commission; Roy D. Williams and Dennis F. Dunlavy, Members of said Commission; Thomas Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for said The Public Utilities Commission of Ohio and the City of Portsmouth, a municipal corporation, admit that plaintiff has heretofore filed its original bill herein and that its said amended bill and second amended bill are supplemental hereto.

Further answering defendants admit all of the allegations of Par. II in said amended bill and said second amended bill, except the following allegation in Par. II of said amended bill:

"While the order of The Public Utilities Commission of Ohio, complained of, accepts the power to require the plaintiff to furnish gas to the defendant Portsmouth Gas Company at such rates as may be prescribed by the defendant The Public Utilities Commission of Ohio, regardless of the contract relations existing between the said plaintiff and the said defendant Portsmouth Gas Company, and the said order, if valid, requires plaintiff to continue furnishing such

natural gas at rates to be prescribed by said Commission, regardless of any agreements or arrangements between the said Portsmouth Gas Company and the said plaintiff."

[fol. 54] Further answering defendants admit the allegations contained in Sentence 1 of Par. III of second amended bill and all of the allegations contained in Par. IV of said second amended bill.

Further answering defendants deny each and every material allegation in said amended bill and said second amended bill not herein expressly admitted to be true.

Wherefore, defendants renew the prayer of their original answer and pray for all such other and further relief as may be necessary or proper in the premises.

The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission; Roy D. Williams and Dennis F. Dunlavy, members of said Commission; Thomas Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio and The City of Portsmouth, a municipal corporation. Thomas J. Herbert, Attorney General of Ohio; Kenneth L. Sater, Attorney for The Public Utilities Commission of Ohio, Solicitors for These Answering Defendants. W. L. Dickey, by K. L. S., Attorney for the City of Portsmouth, a municipal corporation.

Duly sworn to by George McConnaughey. Jurat omitted in printing.

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

THIRD AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT—
Filed April 8, 1941

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this its third amended and supplemental bill of complaint against The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commis-

sion, Thomas Herbert, Attorney General of the State of Ohio, Kenneth L. Sater, Special Counsel for said Public Utilities Commission, the City of Portsmouth, a municipal corporation, and the Portsmouth Gas Company, a corporation, defendants, and respectfully shows:

I

That it has heretofore filed its original bill in this cause, as well as its first and second amended and supplemental bills herein, to which original and first and second amended bills it now refers and asks that all of the allegations thereof, together with the exhibits attached thereto, be now [fol. 56] considered as part of this amended bill.

II

That as will appear from said original bill, this suit was brought for the purpose of enjoining the enforcement of an order of the Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company under a contract in existence at the time of the filing of said original bill and at the time of the entry of said order, and to charge such rate as may be prescribed by said Public Utilities Commission, which order is filed as Exhibit "E" with said original bill in this cause.

That said contract, by its own terms, expired on the 1st day of November, 1936; that it appears from the first amended bill that before the expiration of said contract, the parties extended the expiration date thereof for one year from the 1st day of November, 1936—that is to say, until the 1st day of November, 1937; that before the expiration of said one year, the parties again, as appears from said second amended bill, extended the contract for an additional year—that is, until the 1st day of November, 1938; and that before the expiration of said additional year, the said parties, as appears from said second amended bill, again extended the contract for an additional year, or until such time as the parties should negotiate a new contract upon different terms. All of which appears from the said second amended bill.

That the parties have not negotiated any new contract, but have continued their contractual relations with each

other upon the same terms and conditions as provided by said last extension.

[fol. 57]

III

That since the filing of said second amended and supplemental bill, Roy D. Williams, who is named therein as a member of the Public Utilities Commission of Ohio, has ceased to be a member of said Commission, and that the defendant Harry M. Miller is the successor of the said Roy D. Williams, and the said Harry M. Miller should be substituted as a defendant herein in place of the said Roy D. Williams.

IV

That on the 21st day of June, 1938, the Congress of the United States passed what is known as the "Natural Gas Act"; that by the terms of said act the transaction between this plaintiff and the defendant Portsmouth Gas Company falls within the jurisdiction of the Federal Power Commission under the said "Natural Gas Act"; that said "Natural Gas Act" is contained in U. S. C. A., Title 15, Chapter 15B; that under the provisions of Section 717c, clause (c) of said section, every natural gas company shall file with the Commission schedules showing rates and charges for transportation for sale natural gas subject to the jurisdiction of the Commission; and in paragraph (d) of said section it is provided that no change shall be made by any natural gas company of any such rate or regulation or contract relating thereto, except after thirty days' notice to the Commission and the public; and by paragraph (b) of Section 717f of said act, it is provided that no natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission, first had and obtained, after a due hearing and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permits such abandonment.

V

That in accordance with the requirements of said "Natural Gas Act", this plaintiff filed with said Federal Power

Commission its contract with the said Portsmouth Gas Company as its schedule of rates and charges for the service performed thereunder; that said contract was received by said Commission and filed as such schedule of rates; that, as the same was extended from time to time, as shown by the said second amended bill herein, such extensions were filed with said Commission and approved thereby, the last extension being the one referred to in said second amended bill as created by the letter of October 8, 1938, from Harold A. Ritz to Homer V. Armstrong, and the acceptance of the same by letter from H. V. Armstrong to Harold A. Ritz, which was duly approved by said Federal Power Commission by an order entered by that Commission on the 14th day of February, 1939, to be effective November 1, 1938. An office copy of said order is filed herewith as part hereof, marked Exhibit No. 1.

Plaintiff says that under the "Natural Gas Act" above referred to, the Federal Power Commission has exclusive jurisdiction of the subject-matter of this suit; that it has taken such jurisdiction and is now and has at all times since the enactment of said law, been exercising its jurisdiction and power over the said transaction. That under said "Natural Gas Act" it would be unlawful for this plaintiff to charge any other rate than that on file with said Federal Power Commission, and it would be unlawful for the Public Utilities Commission of Ohio to fix any rate [fol. 59] whatever for the service rendered by this plaintiff to the said Portsmouth Gas Company, that being a matter within the exclusive jurisdiction of the said Federal Power Commission:

This plaintiff reiterates the prayer of its original and first and second amended bills herein, and prays that the said Public Utilities Commission of Ohio be enjoined, inhibited and restrained from attempting in any way to fix a rate for the sale of natural gas by this plaintiff to the said Portsmouth Gas Company.

United Fuel Gas Company, by W. J. Hightower,
Treasurer. Eagleam & Laylin, Harold Ritz, Counsel.

Duly sworn to by W. J. Hightower. Jurat omitted in printing.

[fol. 60] EXHIBIT NO. 1 TO THIRD AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT

UNITED STATES OF AMERICA

Federal Power Commission

Claude L. Draper, Acting Chairman; Basil Manly, Commissioners:

John W. Scott. Clyde L. Seavey, not participating.

February 14, 1939.

In the Matter of UNITED FUEL GAS COMPANY

ORDER ALLOWING RATE SCHEDULE TO TAKE EFFECT PRIOR TO DATE OF FILING

It appearing to the Commission that:

(a) On November 2, 1938, the United Fuel Gas Company filed with the Federal Power Commission its supplemental agreement, dated October 26, 1938, to its agreement of October 22, 1931, with the Portsmouth Gas Company, providing for the sale of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company for resale in Portsmouth, Ohio;

(b) By the terms of said supplement it is to become effective November 1, 1938, and is to continue the terms of said agreement of October 22, 1931, in effect without modification or change for a period of one year from November 1, 1938, or until such time as a new agreement between these two parties can be executed;

(c) Good cause has been shown for, and the public interest will be served by, permitting said supplement to take effect as of November 1, 1938;

The Commission orders that:

The supplement, dated October 26, 1938, between the United Fuel Gas Company and the Portsmouth Gas Company, as filed with the Federal Power Commission on November 2, 1938, be and the same is hereby allowed to take effect as of November 1, 1938.

By the Commission.

/s/ Leon M. Fuquay, Secretary.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION OF PUBLIC UTILITIES COMMISSION TO DISMISS AND
SUPPORTING MEMORANDUM—Filed April 24, 1941**

Now come Defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, and move to dismiss the original and three amended and supplemental bills of complaint filed herein for the reasons and upon the grounds that:

1. Said bills of complaint do not state facts sufficient to warrant this Court in granting plaintiff any relief;
2. Plaintiff has a plain, adequate and complete remedy at law; and,
3. This Court has no jurisdiction over the persons of these moving defendants or any of them or over the subject matter of this action.

This motion is made separately and severally as to each stated reason and ground.

Thomas J. Herbert, Attorney General of the State of Ohio. Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio.

[fol. 62] MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff's third amended and supplemental bill filed herein alleges for the first time the enactment and provisions of the Federal statute familiarly known as the Natural Gas Act. The only inference to be derived from such course of pleading is that that Act has a material bearing on the case at bar (probably an asserted termination of the jurisdiction of defendant Commission in the premises) because otherwise there would be no good purpose served by pleading the Act and plaintiff's asserted compliance therewith. Consequently, and as a result of these allegations, it is necessary and proper for these moving defendants, in maintaining their rights, to present this

motion at this time without answering over to such bill. Generally, it is the purpose of this motion to show to the Court that the questions and matters in issue herein are purely and basically jurisdictional. Specifically, it is the purpose of this motion to show in connection therewith three matters as follows:

1. Plaintiff's bills of complaint state insufficient facts to constitute a cause of action because the provisions of the Natural Gas Act do not apply to an alleged cause of action arising some six or seven years prior to its enactment and effective date and because the trial brief heretofore prepared and filed herein in 1935, on behalf of these moving defendants amply shows full jurisdiction and authority in defendant Commission not only to make the orders in question but also to make a final order thereafter.

2. Although plaintiff's bill was filed so prematurely that it is not entitled at this time to any relief either in this Court or in any court of the state of Ohio, it will at the proper time and in due course, be able to utilize a plain, adequate and complete remedy either at law or in equity in the courts of the state of Ohio upon proper showing made. Until that time arrives, it must comply with the orders of defendant Commission.

3. Even if at this time plaintiff's bill could state sufficient facts to constitute a cause of action, its relief would be through the courts of the state of Ohio and not through [fol. 63] this Court which even in that event is barred by the Federal Johnson Act from assuming jurisdiction, which lack of jurisdiction, this Court is bound sua sponte to recognize.

A motion to dismiss searches the record to date particularly with regard to pleadings filed by the opponent. From plaintiff's original bill, the following key facts are taken:

Defendant Portsmouth Gas Company distributes and sells gas at retail in the City of Portsmouth, Ohio. Its supply at all times mentioned herein has been purchased wholesale from plaintiff. On October 22, 1931 plaintiff entered into a contract with such defendant company to sell gas to it for a period of five years at the price of 37¢ per M c.f. By its terms, this contract would have expired on October 21, 1936. On February 24, 1932, just four months after the date of such contract, defendant City of Portsmouth

enacted an ordinance establishing the retail rate for the sale of gas within such city at 45¢ per M c.f. where the rate had theretofore been 65¢. Promptly, thereafter, defendant Portsmouth Gas Company declined to accept such new rate and appealed from the enactment of such ordinance to defendant Commission which assumed jurisdiction, set bond under which said defendant Company might collect the retail rate last in effect and commenced its usual hearings on such appeal, all as provided by the law of Ohio. On June 18, 1934 defendant Commission made plaintiff a party to the proceeding before it and ordered it to present a copy of its contract with defendant Portsmouth Gas Company. Plaintiff complied with this order. On April 18, 1935 defendant Commission handed down a further order directing plaintiff to submit all pertinent and relevant testimony and evidence tending to prove a just and reasonable rate to be charged by it for its wholesale sale of gas to defendant company; this order was based on findings by defendant Commission that the new ordinance rate was unjust, unreasonable and insufficient to yield a reasonable compensation and that it should substitute therefore a just and reasonable rate but could not do so in the absence of proof [fol. 64] of a just and reasonable rate for plaintiff's sales of gas wholesale to defendant Portsmouth Gas Company. This order was affirmed by defendant Commission on May 29, 1935 and five weeks later, July 3, 1935, this proceeding was instituted by plaintiff. The two orders of defendant Commission appear as Exhibits "E" and "G" to plaintiff's bill. In July, 1935 these defendants filed their answer and on October 21, 1936, as mentioned; plaintiff's contract with defendant Portsmouth Gas Company was due to expire.

From plaintiff's first and second amended and supplemental bills, it is seen that plaintiff and defendant Portsmouth Gas Company "extended" their wholesale contract successively to November 1, 1937 and to November 1, 1938.

From plaintiff's third amended and supplemental bill, it is seen that the contract hereinabove referred to between the plaintiff and defendant Portsmouth Gas Company was again "extended" to November 1, 1939 or until a new contract should be made. It further appears that the Federal Natural Gas Act was duly enacted on June 21, 1938 and that by November 2, 1938 plaintiff had filed with the Federal Power Commission its original contract with defend-

ant Portsmouth Gas Company and the last extension thereto, all in accordance with the requirements of such Natural Gas Act.

I

Plaintiff's bills do not state facts sufficient to warrant this court in granting it any relief.

It should be noted from the foregoing narration of events in their chronological order that the Natural Gas Act was enacted and became effective seven years after plaintiff's contract with defendant Portsmouth Gas Company, two years after the original date of termination of such contract, six and one-half years after the rate ordinance in question was enacted and appealed from, six and one-half years after defendant Commission assumed jurisdiction under the law of Ohio and three and one-half years after this case was filed in this Court.

[fol. 65] Paragraph (c) of Rule 15 of the Federal Rules of Civil Procedure. (U. S. C. A., Title 28, Foll. Sec. 723 (c)) permits certain amendments to relate back to the date of the original pleading. Clearly, however, this cannot be done in the case at bar and plaintiff's three amended and supplemental bills do not fall within the purview of that Rule because in no event can the Natural Gas Act be related back six and one-half years beyond its effective date (U. S. C. A., Title 28, Sec. 747b, 52 Stat. 822, c. 556, Sec. 3) or six years beyond the date of its enactment to the time of the appeal by defendant Portsmouth Gas Company to defendant Commission. There is and can be in none of plaintiff's pleadings, any allegations that the ordinance appealed from to defendant Commission covered a period of time sufficiently long to bring even a part of it within the effective period of the Natural Gas Act, or that the two orders of defendant Commission, of which plaintiff complains, would or did relate to a period of time covered by the Natural Gas Act. It is legally and factually obvious that in none of the proceedings before it, did defendant Commission act with regard to, or as of, any period of time subsequent to June 21, 1938:

To the contrary, the law of Ohio (Sec. 614-44, Ohio General Code) requires defendant Commission to pass on an ordinance with regard to the time during which it is effective (in this instance a two year period beginning February 24, 1932) and under certain conditions to set a substi-

tute rate commencing as of the date of the original enactment of the ordinance under consideration (Sec. 614-46, Ohio General Code). This is because the action of defendant Commission would be a substitute for the ordinance and any action which defendant Commission may ultimately take will consequently be as of February 24, 1932, the "date certain" of the Ohio law (Sec. 499-9, Ohio General Code).

It is obvious that the Natural Gas Act cannot be related back to that date. Thus, the three amended and supplemental bills do not either separately or jointly state facts sufficient to warrant this Court in granting plaintiff any relief and unless the original bill contains a sufficiency of such facts, this suit must be dismissed.

[fol. 66]. Furthermore, no plaintiff may institute litigation on the broad basis of interference with interstate commerce as of the early part of 1932 and at the very end of the litigation in 1941 change that basis to a much narrower and specific ground which did not exist at the start and which cannot be related back six and one-half years to that time.

Section (d) of the same Rule of Civil Procedure allows parties to set up events which have happened "since the date of the pleading sought to be supplemented." In view of the foregoing discussion, it is equally obvious that plaintiff cannot by amendment, make its original bill speak as of any other date than that on which it was filed without so removing its cause of action chronologically from the proceeding before and action by defendant Commission that it would patently be impossible to state a cause of action.

The Natural Gas Act clearly has no place in this litigation and no form of pleading can bring it in. The issues were made when the bill was filed and the matter of interstate commerce was amply briefed to this Court at that time. Consequently, plaintiff's bill takes no strength from the three amendments to it and since it does not state sufficient facts, it must also be dismissed; it is now no stronger than it was on July 3, 1935 when it was filed.

II

Plaintiff has a plain, adequate and complete remedy at law.

The question then arises whether plaintiff is entitled to relief in view of the allegations contained in its original bill. The answer must be in the negative whether plaintiff's bill is considered by itself or in connection with any

or all of the supplemental bills. Section 544, Ohio General Code, states that a final order made by the Commission shall be reversed, vacated or modified by the supreme court on appeal if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable. [fol. 67] able. The commission referred to in that statute is defendant commission. On the equity side of the Ohio law, Sections 11876-11878, Ohio General Code, define injunctions and specify in detail, the jurisdiction to issue them. These four statutes furnish plaintiff with all the remedy necessary to protect its rights and there is no reason or cause for it to bring this or any other action in this Court. *Union Dry Goods Co. vs. Georgia Public Service Corp.*, 248 U. S., 372; 63 L. Ed., 309; 39 S. Ct., 117. These doctrines, principles and modes of redress are, of course, in full harmony with *Prentis vs. Atlantic Coast Line Co.*, 211 U. S. 210; 52 L. Ed., 150; 29 S. Ct., 67, the 3rd syllabus of which is:

"A Federal Circuit Court, on principles of comity should not entertain a suit by which injunctive relief is sought against railroad passenger rates as fixed by the Virginia State Corporation Commission in advance of the appeal to the highest state court from the order fixing the rates, which is given by the state constitution as of right to any aggrieved party".

These remedies via the courts of Ohio were held adequate in *East Ohio Gas Co. vs. Cleveland*, 94 Fed. (2d) 443, which case was preceded by the ruling of the Supreme Court of Ohio in *State Ex Rel. Cleveland vs. Court of Appeals*, 104 O. S., 96; 135 N. E. 377, holding that the creation of defendant Commission and the conferring of jurisdiction upon it in rate making matters did not withdraw from the Courts of Ohio any of the equitable jurisdiction which they had therefore had. Needless to say, these four sections of the Ohio Law antedated by many years the proceedings here under consideration.

It is moreover clear that plaintiff's assertion that it will have to spend a large sum of money in complying with the orders of defendant Commission furnish this Court with no ground for taking jurisdiction in view of *East Ohio Gas Co. vs. Federal Power Commission*, 115 Fed. (2d) 385, wherein review was denied even though the petitioner therein claimed that compliance with the the order of

the Federal Power Commission would cost it nearly twice as much as it is alleged to be involved here. This same [fol. 68] doctrine follows from *Canadian River Gas Co. vs. Federal Power Commission*, 110 Fed. (2d) 350 and all other similar cases wherein jurisdiction to regulate is unsuccessfully or prematurely attacked.

Since the date of the filing of defendant's trial brief herein, the law of both Ohio and of the United States with regard to orders of administrative bodies has been restated and classified. The Ohio Supreme Court had no occasion to define a "final order" as used in Section 544 of the Ohio Code, *supra*, until it received the case of *Dayton vs. Public Utilities Commission of Ohio*, 111 O. S., 476; 145 N. E., 849. In that case, Judge Matthiars held, (479-485) that such an order was one which effected a substantial right and ruled that an order overruling a motion for a rehearing was not a final order. Thereafter, the matter lay until *City of Cleveland vs. Public Utilities Commission of Ohio*, 136 O. S., 410; 26 N. E., (2d) 213, came before that Court. From a power rate ordinance enacted by the appellant City, the Cleveland Electric Illuminating Company appealed to defendant Commission and again, as in the case at bar, a bond was approved for the collection of the rate previously in effect. The City moved to dismiss the appeal on the grounds that the Commission was without jurisdiction to entertain the appeal or to suspend the ordinance rate. This motion was overruled and the City appealed to the Supreme Court of Ohio but on motion its appeal was denied on the ground and for the reason that no action thus far taken by the Commission in that proceeding constituted a final order from which an appeal could be taken. Clearly the orders from which relief is sought in the case at bar fall in the same category; they are not final orders.

A similar line of discussion has recently been considered and restated in the Federal Courts and the state rule relative to final orders has found its exact counterpart in the decisions in the Federal Courts. The entire matter of administrative orders was discussed by the Court in *Rochester Telephone Co. vs. United States of America*, 307 U. S., 125; 83 L. Ed., 1147; 59 S. Ct., 754. Therein the Court found [fol. 69] that previous court decisions involving the "negative order" principle fall into three classes (307 U. S. at

page 129; 83 L. Ed., at page 1152) and described the first class as follows:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order."

This definition was followed by the United States Circuit Court of Appeals for the Sixth Circuit in *East Ohio Gas Co. vs. Federal Power Commission*, supra, in its holding that the order of respondent Federal Power Commission was an interim order not subject to judicial review. The third and fifth syllabi of that case state:

"An order of the Federal Power Commission which decreed that company which distributed natural gas to consumers was engaged in transportation of natural gas in interstate commerce and was therefore a natural gas company within meaning of Natural Gas Act, directed investigation into cost of transportation of natural gas to be undertaken, and directed the company to furnish certain data, was not reviewable by the Circuit Court of Appeals. Natural Gas Act §§ 1-24, and §§ 5(b), 19(a, b), 15 U. S. C. A. §§ 717-717w, and §§ 717d (b), 717r(a, b)."

"An order of the Federal Power Commission which declared that company which was engaged in distributing natural gas to consumers was a "natural gas company" within the meaning of Natural Gas Act, and directed investigation into cost of transportation of natural gas to be undertaken, and directed the company to furnish certain data, was not reviewable by Circuit Court of Appeals because of mere expectation that other orders of the Commission applicable to all natural gas companies might follow. Natural Gas Act §§ 1-24, and §§ 5(b), 19(a, b), 15 U. S. C. A. §§ 717-717w, and §§ 717d (b), 717r (a, b)."

Certainly there can be no closer parallel than that between these quotations and the case at bar. It is apparent beyond peradventure of doubt that the danger and loss which plaintiff anticipates flow not from the Commission's orders

of April 18, 1935 and May 29, 1935 here in issue but from [fol. 70] some future order which defendant commission has not yet made and which plaintiff can do no more than conjecture to be adverse when, as and if it is made. We respectfully submit, in view of the foregoing authorities, that plaintiff's basic fear is that defendant Commission will when this case is disposed of set aside plaintiff's contract rate with defendant Portsmouth Gas Company on some such ground as fraud, mismanagement or lack of discretion and establish for distribution rate purposes a lower allowance for wholesale purposes. The orders of defendant Commission are important only in that compliance therewith may bring out sufficient evidence to justify defendant Commission in making some such future order or finding, all as of February 24, 1932. However, at this time, plaintiff's pleadings are and cannot be other than silent on the questions whether any such orders of defendant Commission when made will be adverse to plaintiff, or will in any wise disturb its said contract rate of October 22, 1931.

Thus, by coordination and analysis of the statutes and authorities, we find that plaintiff has a plain, adequate and complete remedy both at law and in equity in the courts of the state of Ohio and may in due course take its choice of remedies on proper showing to the proper state court. That its purported financial loss and the lack of final order temporarily prevent it from seeking such remedies is no excuse especially when we consider that even if the orders complained of had been made by a Federal Commission, plaintiff could have obtained no relief or review. It is utterly unthinkable to assume that this Court whose jurisdiction is limited and which is presumed to be without jurisdiction unless it affirmatively appears (Simkins Federal Practice (Rev. Ed. 1923) 9, 298) should allow what powers it has to be used in a case where it would not have had jurisdiction if the cause had arisen in a Federal Commission and where by the rules of its immediate superior courts as well as the Supreme Court of Ohio, there is no cause of action in the state courts until some further change of position occurs in the future.

[fol. 71] The first two grounds of this motion have been considered and ruled on by the Supreme Court of Ohio in East Ohio Gas Co. vs. Public Utilities Commission of Ohio, 137 O. S., 225; 28 N. E. (2d) 599, where the Court said on pages 253-254:

"As to the first complaint, the commission had before it a rate ordinance of only two years' duration, expiring July 1, 1939, and had to move with celerity in the main objective of fixing the fair and reasonable rate which the consumers should pay for their gas as it came from the burner tips on their premisses. And in so doing it was the duty of the commission to fix a rate in Cleveland as of June 30, 1937. Any river rate the Federal Power Commission might designate would be of an entirely prospective nature and would consequently be of no benefit or controlling force in the present proceedings."

III

This Court Has No Jurisdiction Over the Persons of These Moving Defendants or Any of Them or Over the Subject Matter of This Action

On May 14, 1934 the Congress of the United States enacted the Johnson Act, 28 U. S. C. A. Sec. 41(1), 48 Stat. 775, the material portion of which provides that:

"(1-3) No district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

This statute was followed by the United States Circuit Court of Appeals for the Sixth Circuit in *East Ohio Gas Co. vs. Cleveland*, supra. In that case, the District trial court was affirmed in declining to take jurisdiction in a [fol. 72] rate matter wherein the relief sought was basically the same as in the case at bar, namely, injunctive relief against a local regulatory body. On the basis of the statutes and authorities cited and discussed herein, we submit that the two cases cannot be distinguished since the case at bar

was instituted somewhat more than a year after the passage of the Johnson Act.

While it is true that this deficiency in the jurisdiction of this Court could have been attacked in limine, it is also true not only that parties to a cause cannot confer jurisdiction upon the Courts of the United States by consent where none would exist without it (7 Encyc. U. S. S. Ct. Reports 741 and cases there cited), but also that the Court will raise the question of its jurisdiction *sua sponte* (Simkins Federal Practice 286, 458). We respectfully submit that assumption of jurisdiction by this Court in the premises will be a disregard not only of the Johnson Act but also of the rule and principle of comity enunciated by the Supreme Court of the United States in *Prentiss vs. Atlantic Coast Line Co.*, *supra*. This Act and this principle do not conflict with, but to the contrary reaffirm, the propriety and adequacy of state court remedies not only as such but also in the interest of jurisdictional harmony.

1. In conclusion, we respectfully submit that plaintiff's bills separately and severally state insufficient facts to constitute a cause of action because the provisions of the Natural Gas Act do not and cannot apply to an alleged cause of action arising six or seven years prior to its enactment and effective date, and because defendants' trial brief, already filed herein, amply shows defendant's Commission to hold full jurisdiction and authority to make not only the orders in question but also to make a final order thereafter.

2. Although plaintiff's bill was filed so prematurely that it is not entitled at this time to any relief in any court [fol. 73] either state or federal, it will at the proper time and in due course, be able to utilize a plain, adequate and complete remedy either at law or in equity in the courts of the state of Ohio upon proper showing; and in those courts it may have adjudicated whatever claims it may assert as to property rights or constitutional rights. But until that time arrives, it must comply with the orders of defendant Commission.

3. Even if it were possible at this time for plaintiff to state sufficient facts to constitute a *prima facie* cause of action, its relief would be through the courts of the state of Ohio and not through this Court which is barred by

the Johnson Act from assuming jurisdiction in the premises, a fact which it is bound to recognize.

We are authorized to say that the defendant City of Portsmouth concurs and joins in this motion and memorandum.

Respectfully submitted, Thomas J. Herbert, Attorney General of the State of Ohio. Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS—Filed July 8, 1941

This day this cause came on to be heard on the motion heretofore, to-wit: on April 24, 1941, filed on behalf of Defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, to dismiss the original and three amended and supplemental bills of complaint filed herein for the reasons and upon the grounds set forth in the motion, and was submitted upon the briefs and arguments of counsel.

Upon consideration whereof, the court, being fully advised in the premises, finds said motion not well taken, and that it should be overruled.

It is, therefore, by the court ordered, adjudged and decreed that the motion to dismiss above referred to, be, and the same is, overruled. To all of which findings, rulings, orders and decrees of the court defendants; above named, hereby except.

(Sig.) Florence E. Allen, Judge, U. S. Circuit Court of Appeals; (Sig.) Robert R. Nevin, Judge, U. S. District Court; (Sig.) Mell G. Underwood, Judge, U. S. District Court.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ANSWER OF PUBLIC UTILITIES COMMISSION TO THIRD AMENDED
AND SUPPLEMENTAL BILL—Filed August 4, 1941**

**To the Honorable Judges of the District Court of the United
States for the Southern District of Ohio:**

For answer to so much of the third amended and supplemental bill of complaint filed herein as they are advised it is necessary for them to make answer unto, defendants Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Public Utilities Commission of Ohio, say:

I

These answering defendants admit that plaintiff has heretofore filed its original bill in this cause as well as its first and second amended and supplemental bills and say further that in answer thereto they have heretofore filed herein their answer and supplemental answer, to which said answers they now refer and ask that all of the allegations thereof be considered as part of this answer to plaintiff's third amended and supplemental bill of complaint.

II

These answering defendants say that this suit was brought for the purposes of obtaining a decree to (1) declare null and void and of no effect the two orders of defendant Commission dated April 18, 1935, and May 29, 1935, requiring plaintiff to present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, and denying, for reasons there stated, plaintiff's application for a rehearing, copies of which said orders are attached to plaintiff's original bill and marked Exhibits "E" and "G" respectively; (2) enjoin, inhibit and restrain these answering defendants from enforcing said orders and from regulating

or attempting to regulate the transactions between plaintiff and defendant The Portsmouth Gas Company; and (3) enjoin, inhibit and restrain defendant City of Portsmouth from prosecuting any proceeding for the purpose of abrogating or destroying the validity of the contract between plaintiff and said The Portsmouth Gas Company. *

These answering defendants say further that said orders were issued by defendant Commission in the hearing before it of the appeal by defendant Portsmouth Gas Company from the two-year gas distribution rate ordinance enacted by defendant City of Portsmouth on February 24, 1932, which said ordinance, appeal and order are alleged and referred to in Sections II and IV of plaintiff's original bill herein. Further answering, these defendants say that when defendant Portsmouth Gas Company appealed to defendant Commission in February, 1932, as set forth in plaintiff's original bill, it gave a bond prescribed by defendant Commission and ever since then has been collecting for the retail distribution of gas in the defendant City of Portsmouth, the rate which was in effect in said defendant City prior to the passage of the said rate ordinance dated February 24, 1932. These defendants say that said ordinance, appeal, bond and order were each duly enacted and performed under the laws of the State of Ohio then and now in full force and effect. They further say that by reason of the temporary restraining order granted herein, hearings on said appeal of The Portsmouth Gas Company before defendant Commission have been restrained and suspended since July, 1935.

These answering defendants admit that when said ordinance was enacted and said orders issued, there existed a contract dated October 22, 1931, as shown by Exhibit A attached to plaintiff's original bill, between plaintiff and defendant Portsmouth Gas Company for the wholesale purchase of natural gas by said defendant Portsmouth Gas [fol. 77] Company from plaintiff and that said contract by its terms expired on or about November 1, 1936. Further answering these defendants deny each and every allegation in paragraph II of plaintiff's third amended and supplemental bill not herein expressly admitted to be true.

These answering defendants admit the allegations of Section III of said third amended and supplemental bill.

These answering defendants admit all of the allegations of section IV of plaintiff's third amended and supplemental

bill except the second clause thereof which allegation they specifically deny. Said allegation asserts that by the terms of the federal Natural Gas Act, the transaction between this plaintiff and the defendant Portsmouth Gas Company falls within the jurisdiction of the Federal Power Commission.

These answering defendants further say that neither said Natural Gas Act nor the jurisdiction of the Federal Power Commission thereunder is retroactive from the date of the passage of said Act, June 21, 1938, and that section 717b of said Act specifically sets the effective date thereof at December 21, 1938. They further say that since the municipal rate ordinance in question out of which this controversy arose was enacted on February 24, 1932, and expired by its terms two years later, that since the appeal of the Portsmouth Gas Company to defendant Commission from said ordinance was made in February, 1932, that since the orders of defendant Commission against the enforcement of which plaintiff seeks injunctive relief herein were made on April 18, 1935, and May 29, 1935, that since plaintiff commenced this action herein on July 12, 1935, and that since the transaction covering the sale of gas from plaintiff to the Portsmouth Gas Company is not interstate commerce, the regulation of said transaction is not a regulation of interstate commerce, and power and jurisdiction over said transaction now are and at all times herein mentioned have been full and complete in defendant Commission, including jurisdiction to make and enforce the orders complained of. [fol. 78] For want of knowledge and information, these answering defendants deny each and every allegation contained in paragraph one of section V of plaintiff's third amended and supplemental bill; they further deny each and every allegation of paragraph two of said section V.

III

Further answering these answering defendants say that while the appeal of defendant Portsmouth Gas Company from the said distribution rate ordinance of defendant city of Portsmouth was pending before defendant Commission as alleged in plaintiff's original bill, there was also pending before said Commission the appeal of Columbus Gas and Fuel Company, a retail distributor of natural gas, from a similar rate ordinance of the city of Columbus, Ohio, dated

September 3, 1929, the hearings on which appeal had been completed a short time prior to October 3, 1932; and that there was also pending but unheard the appeals of said Columbus Gas and Fuel Company and of the Federal Gas and Fuel Company, which was also a distributor of natural gas, from a similar ordinance of said city of Columbus, Ohio, dated September 10, 1934. These companies making said appeals from said rate ordinances of the city of Columbus purchased large quantities of the gas sold and distributed by them in said city of Columbus from either the United Fuel Gas Company, plaintiff herein, or from the Ohio Fuel Gas Company which in turn purchased gas from said plaintiff which, as alleged in its original bill, is a West Virginia corporation but which has also been authorized to do business in Ohio since before 1916.

Both plaintiff, United Fuel Gas Company, and said Ohio Fuel Gas Company are and at all times mentioned were affiliated with such distributing companies, their successors and assigns, by reason of their capital stock being owned by Columbia Gas and Electric Corporation. The gas so sold by plaintiff and distributed by said Columbus Gas and Fuel Company, Ohio Fuel Gas Company and Federal Gas and Fuel Company, their successors and assigns, was delivered by plaintiff at two points in Ohio at or near the Ohio River, one of which points is a short distance east of [fol. 79] Pomeroy in Meigs County, Ohio, and the other is a short distance east of Ironton in Lawrence County, Ohio. These points are respectively about 70 and 35 miles east of Portsmouth, Ohio, and are the northern termini of plaintiff's line facilities. These answering defendants say that these transactions between plaintiff, United Fuel Gas Company, and both the Ohio Fuel Gas Company and defendant, Portsmouth Gas Company, were for the sale, transmission and delivery of plaintiff's gas for resale and were made at prices originally established between the parties by contract. They say further, however, that the performance of these contracts by plaintiff, United Fuel Gas Company, differed in that the sales and deliveries to Ohio Fuel Gas Company were made by plaintiff through pipe lines used by it for the sale, transmission and delivery of gas in wholesale quantities only, while in the latter case plaintiff, United Fuel Gas Company, out of the same pipe line which it used to transport its gas to defendant, Portsmouth Gas Com-

pany, also delivered other gas from the same sources directly and at the same time and place into its own distribution system by which it supplied local consumers in the town of New Boston, Ohio, which is a suburb of Portsmouth, and in the city of Ironton, Ohio.

On October 3, 1932, defendant Commission handed down its findings and order in the matter of the said appeal from the said Columbus, Ohio, rate ordinance of September 3, 1929, and found that a just and reasonable rate for plaintiff, United Fuel Gas Company, to charge for gas wholesale in Ohio at the Ohio River was 22.04¢ per M c.f. These findings and order of defendant Commission were appealed to both the Supreme Court of Ohio and the Supreme Court of the United States. The Supreme Court of Ohio on June 21, 1933, reversed defendant Commission and set such river rate at 17.79¢ per M c.f. but the Supreme Court of the United States by its action re-established such rate on May 21, 1934, at substantially 22.04¢. In 1935, plaintiff, United Fuel Gas Company, presented to defendant Commission as shown by its original bill of complaint herein its contract with defendant, Portsmouth Gas Company, establishing a river rate of 35¢ per M c.f. for the city of Portsmouth, defendant herein.

[fol. 80] Thereafter on August 18, 1939, defendant Commission handed down its findings and order in the matter of the said appeals from the said Columbus rate ordinance of September 10, 1934, and found that a just and reasonable system-wide rate for plaintiff, United Fuel Gas Company, to charge purchasers including Ohio Fuel Gas Company, successor to said Columbus Gas and Fuel Company and Federal Gas and Fuel Company, for gas wholesale at the Ohio River was 22.03¢ per M c.f. This system-wide rate was set with the knowledge and consent of plaintiff, United Fuel Gas Company, and when set made due allowance for the cost of gas delivered by said plaintiff Company at the city gate of Portsmouth, Ohio. These answering defendants further say that at the hearings of the appeals in which said system-wide rate was set, plaintiff herein, United Fuel Gas Company, produced and offered in evidence before defendant Commission its contract with Ohio Fuel Gas Company for the sale of gas for 26.5¢ at the two points described above in Lawrence and Meigs Counties, Ohio, which said rate was the same as that in the preceding case referred to above.

Wherefore, these answering defendants renew the prayer of their original answer.

The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission; Dennis F. Dunlavy and Harry M. Miller, members of said Commission; Thomas J. Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio; Thomas J. Herbert, Attorney General of Ohio; Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio, Solicitors for these Answering Defendants.

Duly sworn to by George McConnaughey. Jurat omitted in printing.

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO ANSWER—Filed August 27, 1941

To the Honorable Judges of Said Court:

The defendant Public Utilities Commission of Ohio has filed an answer to the Third Amended and Supplemental Bill of Complaint. A perusal of this answer indicates that there is nothing in it but a restatement of what was set up in the motion to dismiss, recently overruled by this Court, except a denial that the gas involved in this case is interstate commerce. This denial is in flat contradiction of the agreed statement of facts upon which the case was submitted originally and with the findings of the defendant Public Utilities Commission itself, as is shown by its order entered on the 29th day of May, 1935 (See page 50 of the printed bill of complaint and exhibits filed herein, being Exhibit "G" with said bill).

Respectfully submitted, Harold A. Ritz, Freeman T. Eagleson, for Plaintiff.

[fol. 83] IN UNITED STATES DISTRICT COURT

UNITED FUEL GAS COMPANY, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, et al., Defendants

OPINION—Filed October 2, 1941

Before Allen, Circuit Judge, and Nevin and Underwood,
District Judges

Per CURIAM:

Plaintiff, a West Virginia corporation, is a producer and purchaser of natural gas in that state. Defendants are The Public Utilities Commission of Ohio (hereinafter called The Commission); certain named state officials acting for it and on its behalf; The City of Portsmouth, Ohio, and Portsmouth Gas Company, an Ohio corporation. Due to their tenure of office and for various reasons changes have occurred from time to time in respect to individual defendants but proper substitutions have been made.

In 1931 plaintiff entered into a contract with defendant, Portsmouth Gas Company, for sale to that company of a supply of natural gas which Portsmouth Gas Company in turn sold and distributed to its customers in Portsmouth, Ohio. Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own. That contract ran for five years. It expired on November 1, 1936. Prior to its expiration, the date thereof was extended, however, to November 1, 1937, (Amended Complaint and Stipulation of parties both filed November 20, 1936) and thereafter to November 1, 1941. (Second Amended Complaint filed March 8, 1939 and Third Amended Complaint filed April 8, 1941.)

After the two gas companies had entered into their contract, the City of Portsmouth passed an ordinance fixing certain rates for the distribution of natural gas in that city. Not content with those rates, the Portsmouth Gas Company appealed to The Public Utilities Commission of Ohio. For its determination of the question presented, The Commission found that it was necessary to bring plaintiff herein into the proceedings before it, and it was so ordered.

[fol. 84] Plaintiff appeared before The Commission and moved to be dismissed but its motion was denied.

After a hearing, The Commission found on April 18, 1935, that the rates fixed by the city ordinance of The City of Portsmouth "are manifestly unjust, unreasonable and insufficient to yield reasonable compensation" to the Portsmouth Gas Company, and it further found and ordered on said date, as follows: "The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission.

"The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

"Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. • • •"

On May 14, 1935, plaintiff herein filed a "Petition for Rehearing" before The Commission on the order, insofar as it was affected thereby, entered on April 18, 1935.

Subsequently, to-wit: on May 29, 1935, The Commission denied this application for a rehearing and its order of April 18, 1935, was left in full force and effect. However, along with its denial of the application and in the same order, The Commission ordered as follows: "That the findings made and entered herein upon April eighteenth, 1935,

be, and hereby the same are supplemented with the following additional findings of fact, to-wit: That the gas being [fol. 85] delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company thru a distribution system owned by said The United Fuel Gas Company; and

"That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

"The Commission further finds that the following findings set forth and adopted in said findings as so adopted upon April eighteenth, 1935, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission' should be, and hereby the same is modified, amended and supplemented to read as follows, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within

the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.

[fol. 86] Thereafter, on July 3, 1935, plaintiff filed its bill of complaint herein praying, for the reasons alleged in the bill, *inter alia*, "That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect." and that The Commission and certain of the defendants, acting for it and on its behalf "Be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing."

Plaintiff prayed also for a temporary restraining order and, on July 3, 1935, a temporary restraining order as prayed for was signed and issued by the late Hon. Benson W. Hough,¹ then United States District Judge for the Southern District of Ohio.

In its bill of complaint, plaintiff sets out several reasons upon any or all of which it claims it is entitled to the relief prayed for.

At the outset and primarily, however, it challenges the jurisdiction of The Commission, claiming that The Commission "is without any jurisdiction to make such orders or requirements of this plaintiff;" and "that the statute under which it is acting; giving it such power as construed

¹ Subsequently, the cause came on for hearing and argument before a statutory three-judge court, of which Judge Hough was a member. Judge Hough died, however, before the case was decided necessitating a re-argument at a later date before the three-judge court, as now constituted.

by it, violates the commerce clause of the Constitution of the United States * * *."

In their answer, filed July 30, 1935, The Commission and the other defendants named herein as acting for and in its behalf assert that The Commission does have jurisdiction; that the statute referred to is constitutional, and that the orders and directions of The Commission are in all respects proper and according to law.

On September 23, 1935, a stipulation, signed by counsel for the respective parties thereto, was filed, reading as follows: "It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the Court as admissions of the parties in regard thereto * * *."

On November 20, 1936, plaintiff filed an Amended Bill of Complaint and on March 8, 1939, its Second Amended and Supplemental Bill of Complaint, praying in each instance as in its original Bill.

On March 10, 1939, a Stipulation, signed by all the parties was filed herein, reading as follows: "It is hereby stipulated by the parties to this proceeding that the facts stated in the second amended bill of complaint herein are true and may be considered by the court as having been proven herein. This does not apply to Conclusions of Law."

On April 8, 1941, plaintiff filed a Third Amended and Supplemental Bill of Complaint reiterating therein the prayer of its original and Amended Bills.

On April 24, 1941, defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, filed a motion to dismiss the Third Amended Bill of Complaint for the reasons and on the grounds set forth in the motion. This motion was overruled on July 8, 1941.

On July 28, 1941, defendants filed an application for leave to file their answer to plaintiffs third amended and supplemental complaint. On August 4, 1941, leave was granted

defendants so to do, and on the same day, to-wit: August 4, 1941, defendants filed their answer.

The cause is now before the Court on plaintiff's Third Amended and Supplemental Bill of Complaint; defendants' answer thereto (just referred to) and the record, including the Stipulation (above) of the parties as to the facts, which as alleged in the Third Amended Bill are in substance the same as stated in the Second Amended Bill (and in the original Bill and Amended Bill as well, except for a reference to the "National Gas Act" in the Second Amended Bill,) except that it is recited in the Third Amended Complaint that the contract between plaintiff and defendant, Portsmouth Gas Company, referred to in the Second Amended Complaint has been continued by the parties thereto "Upon the same terms and conditions as provided by said last extension."

[fol. 88] In their brief (Pp. 5-6), counsel for The Commission and those defendants acting for it and on its behalf say "It may be conceded upon the basis of the record taken before The Commission that the transportation into the State of Ohio by pipe lines of gas produced by the Plaintiff in West Virginia and Kentucky is interstate commerce. It may be further conceded that the primary power to regulate the transportation of gas in interstate commerce rests with the Congress of the United States and that the Congress of the United States has not yet seen fit to exercise that power. It may be admitted further that if the mere fact that the transportation of such gas in interstate commerce precludes the state from exercising any jurisdiction thereover despite the fact that Congress has not seen fit to exercise its powers, and despite the fact that the exercise of such jurisdiction may be necessary in the interests of local regulation and despite any other facts which may be presented in a particular case, then The Public Utilities Commission of Ohio has no jurisdiction over the United Fuel Gas Company in the case that is here presented.

"On the other hand, if the interstate Transportation of gas does not of itself preclude state regulation in a proper case where the nature of the regulation is primarily local in character, and where it is essential to the exercise of the regulatory functions of a public service commission, and where the particular facts of the case warrant the exercise

of the power conferred by the legislative enactment in the state in question, and where Congress has failed to exercise its paramount authority, then the orders of The Public Utilities Commission of Ohio which are here sought to be enjoined may be sustained."

The sale and delivery of natural gas to the Portsmouth Gas Company is thus clearly interstate commerce, and compilation of voluminous data has been demanded for use in a proceeding by the State Commission to determine the fair and reasonable rate to be collected by the local distributing company with which the plaintiff has contracted to sell its product and services for a definite period at a definite price. The two contracting parties are entirely separate and distinct from each other and are so operated. In view of such relationship and the nature of the inquiry before the Ohio Commission it is believed that the jurisdiction sought to be asserted falls outside the orbit of state regulation now permissible.

Since this suit was instituted, the Congress of the United States, to-wit, on June 21, 1938, passed an Act known as the "Natural Gas Act" entitled "An Act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." Title 15, Sec. 717, U. S. C. A. c. 556, Sec. 1, 52 Stat. 821. Among others, the Natural Gas Act contains the following provisions: "Section 1. [fol. 89] (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use; and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable * * *."

"Sec. 5. (a) Whenever the Commission * * * shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company * * * sub-

ject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . .

"Sec. 5. (b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

"Sec. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300, held a state statute which demands access to books and accounts of a pipe line company selling natural gas in interstate commerce and requires production of the information [fol. 90] sought, to be not unconstitutional. That case involved a transaction between public utilities which were affiliates. Here the plaintiff and the defendant the Portsmouth Gas Company are conceded by the defendant Commission to have no connection with each other by way of interlocking directorates, unity of interest, or affiliation. They are entirely separate and distinct from each other and are so operated. Their dealings were and are at "arm's length." Cf. Natural Gas Pipe Line Co. v. Slattery, *supra*, at 306. This is an important distinction and completely differentiates the operation herein involved, from that held to be subject to examination in the Slattery case. However, it is not the sole differentiating feature between the two

cases, for the Slattery case was decided prior to the enactment of the "Natural Gas Act," supra, the provisions of which, in our opinion, compel the issuance of the injunction prayed for.

Regardless of the right or jurisdiction of the Ohio Commission to issue the orders herein complained of on April 18, 1935, and May 29, 1935, it was deprived of any further jurisdiction by the passage of the Natural Gas Act on June 21, 1938. The transactions involved are squarely covered by the Natural Gas Act, constituting as they do "the sale in interstate commerce of natural gas for resale for ultimate public consumption" (Sec. 1 (b)). Under this statute the Public Utilities Commission of Ohio might have filed a complaint charging that the rates made by the United Fuel Gas Company in the sale of its gas to the Portsmouth Gas Company are unjust, unreasonable, or unduly discriminatory or preferential, and the Federal Commission thereupon would have been empowered to determine the just and reasonable contract rate to be thereafter observed and enforced. Section 5 (a). The Federal Power Commission is required to "make available" to the Ohio Commission such information and reports as may be of assistance in state regulation, and may upon request from the Ohio Commission make available as witnesses any of its own trained experts. Section 17 (c). We think that these provisions are significant.

Prior to the enactment of the Natural Gas Act it was permissible for the state to regulate local features of interstate commerce in gas. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29; *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465. Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission. The right to conduct investigations [fol. 91] as to contracts for sale of gas in interstate commerce, which is an incident to the rate-making power, is also exclusively confided to the Federal Power Commission. We conclude that since the passage of the Natural Gas Act the Ohio Commission and these defendants acting for it and on its behalf have been and are without legal right or

authority to enforce the orders of the Commission entered April 18, 1935, and May 29, 1935.

Upon the record here the court finds, therefore, that an interlocutory injunction should be granted enjoining defendant, The Public Utilities Commission of Ohio and each and all other defendants herein acting for it or on its behalf from enforcing or seeking to enforce, or execute, the orders of the Commission entered by it on April 18, 1935, and May 29, 1935, against plaintiff herein.

The court adopts as its Findings of Fact herein, the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, to the extent and as set forth and referred to by the parties to the Stipulation filed herein on September 23, 1935.

Each party to pay its own costs.

Counsel may prepare and submit an order accordingly.

Florence E. Allen, Judge, U. S. Circuit Court of Appeals. Robert R. Nevin, Judge, U. S. District Court. Mell G. Underwood, Judge, U. S. District Court.

APPEARANCES:

For Plaintiff: Harold A. Ritz, Charleston, W. Va.; Freeman T. Eagleston, Columbus, Ohio.

For Defendant, The Public Utilities Commission of Ohio, et al.: Hon. Thomas J. Herbert, Attorney General of Ohio, Kenneth L. Sater, Special Counsel for The Commission, Columbus, Ohio.

For Defendant, The City of Portsmouth, Ohio: W. L. Dickey, Portsmouth, Ohio.

For Defendant, Portsmouth Gas Company: John F. Beasley.

[fol. 92] IN UNITED STATES DISTRICT COURT

UNITED FUEL GAS COMPANY, Plaintiff,

VS.

THE PUBLIC UTILITIES COMMISSION OF OHIO, Defendant

DECREE—Filed January 16, 1942

This cause came on to be heard upon the original bill and exhibits therewith filed, and upon the several amended and supplemental bills, the answer of the several defendants,

the agreed statement of facts, and all orders heretofore made and entered herein; and the parties having offered nothing further in support of their respective contentions the case is submitted for final decision; from all of which matters so submitted, the Court is of the opinion, for reasons stated in writing and filed with the record herein, that the plaintiff is entitled to the relief prayed for in its original and amended and supplemental bills.

It is therefore adjudged, ordered and decreed that the defendant, Public Utilities Commission of Ohio, and each and all other defendants herein acting for it or on its behalf be and they hereby are enjoined from enforcing or seeking to enforce or execute against the plaintiff the orders of said The Public Utilities Commission of Ohio entered by it April 18, 1935, and May 29, 1935, which orders are exhibited with the plaintiffs' original bill filed herein.

Each party shall pay its own costs.

To all of which defendants jointly and severally except, and their exceptions are hereby noted of record.

Judge Florence E. Allen, Judge United States Circuit Court of Appeals; Robert R. Nevin, Judge United States District Court; Mel G. Underwood, Judge United States District Court.

January 16, 1942.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PUBLIC UTILITIES COMMISSION FOR APPEAL—
Filed April 9, 1942

Applicants, The Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, conceiving themselves aggrieved by the decision, and order and decree made and entered on the second day of October, 1941, and the sixteenth day of January, 1942, respectively, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the

reasons specified in the assignment of errors which is filed herewith and pray that this appeal may be allowed and that a transcript of the record, proceedings, and papers, upon which said injunction and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for
Applicants, State House Annex, Columbus, Ohio.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted].

ASSIGNMENT OF ERRORS—Filed April 9, 1942

Now come applicants, The Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, and in connection with their appeal, say that in the record and proceedings in this cause manifest errors intervene to their prejudice and injury and, in connection with their said appeal, assign the following errors upon which they rely to reverse the order and decree heretofore entered herein, to wit:

1. The District Court erred in holding that it had jurisdiction of the subject matter of the cause of action herein.
2. The District Court erred in holding that the sale of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company constitutes interstate commerce.
3. The District Court erred in holding that the contract between the United Fuel Gas Company and the Portsmouth Gas Company was the result of arm's length bargaining.
4. The District Court erred in holding that the orders in question of the Public Utilities Commission of Ohio, dated April 18, 1935, and May 29, 1935, respectively, were outside of either the orbit of state regulation or the jurisdiction of such Commission.

[fol. 95] 5. The District Court erred in holding that either appeal of the Portsmouth Gas Company to the Public Utilities Commission of Ohio, or the cause of action in the case at bar is in any way affected by the enactment of the federal Natural Gas Act.

6. The District Court erred in holding that the jurisdiction of the Public Utilities Commission of Ohio to make and enforce its orders of April 18, 1935, and May 29, 1935, was in any way affected by the enactment of the federal Natural Gas Act.

7. The District Court erred in holding that the dealings between the United Fuel Gas Company and the Portsmouth Gas Company were, or are now, protected by the federal Natural Gas Act from regulation by the Public Utilities Commission of Ohio.

8. The District Court erred in holding that any rate which might be set by the Federal Power Commission, or that any information or reports which such Commission might make available to the Public Utilities Commission of Ohio could be used in the determination of a just and reasonable distribution rate for the sale of natural gas in the city of Portsmouth, Ohio, for the period of time in question.

9. The District Court erred in holding that the Federal Power Commission has or ever had jurisdiction over any dealings between the United Fuel Gas Company and the Portsmouth Gas Company during the period of time in question.

10. The District Court erred in holding that the federal Natural Gas Act compels the granting of any relief at all to the United Fuel Gas Company in the case at bar.

11. The District Court erred in enjoining the above-described orders of the Public Utilities Commission of Ohio.

12. The District Court erred in holding that the above-described orders of the Public Utilities Commission of Ohio interfere with interstate commerce, or impair any contract or deprive the United Fuel Gas Company of any property without due process of law.

[fol. 96] 13. The final order of the District Court herein, dated January 16, 1942, and the decision in support thereof, dated October 2, 1941, are not supported by the law or the evidence.

14. The District Court erred in overruling the motion to strike United Fuel Gas Company's original and three amended and supplemental petitions from the files.

Wherefore, applicants pray that the order and decree of the said District Court be reversed.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for Applicants.

[fol. 97] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—April 9, 1942.

In the above entitled cause applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of Ohio and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order and decree of this court entered January 16, 1942, permanently enjoining enforcement of two orders of said the Public Utilities Commission of Ohio dated April 18, 1935, and May 29, 1935, (a copy of which orders is attached to complainant's bill of complaint herein and marked Exhibits "E" and "G"), and applicants having also made and filed an assignment of errors and prayer for reversal, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is therefore, considered, ordered, adjudged and decreed that the appeal be and the same hereby is allowed and is made returnable within 40 days from the date hereof;

It is further ordered that the clerk of this Court prepare and certify a transcript of the record, proceedings and final decree in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within 40 days from the date hereof:

It is further ordered that applicants give bond as security for costs on appeal in the sum of \$500.00.

April 9, 1942.

Mell G. Underwood, U. S. District Judge.

[fol. 98] Citation in usual form to United Fuel Gas Company omitted in printing.

[fols. 99-100] Cost Bond on Appeal for \$500 approved and filed April 9, 1942 omitted in printing.

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR RECORD ON APPEAL—Filed April 9, 1942

Applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States and for the purpose of enabling the clerk to prepare the record for appeal herein from the final order and decree of the District Court dated January 16, 1942, to the Supreme Court of the United States, hereby request the clerk to include in the record on such appeal the herein-after indicated papers and pleadings, to wit:

Bill of complaint and exhibits attached thereto.

• Appearances.

Answer.

Stipulation.

Amended Bill.

Second amended and supplemental bill.

Supplemental answer.

Third amended and supplemental bill.
Motion.

Order overruling motion.

Answer to third amended and supplemental bill.

Complainant's statement.

Decision.

Final order and decree.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Jurisdictional statement.

[fol. 102] Notice.

Citation with acknowledgement of service on appellee and receipt therefor.

Cost Bond on Appeal.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for
Applicants.

[fol. 103] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION MODIFYING PRAECIPE FOR RECORD ON APPEAL—
Filed April 22, 1942

It is hereby stipulated and agreed that the praecipe for the record on appeal heretofore filed herein shall be and hereby is modified to include the separate answers of defendants City of Portsmouth and The Portsmouth Gas Company.

Harold A. Ritz, Counsel for United Fuel Gas Company, Complainant-Appellee. Thomas J. Herbert, Kenneth L. Sater, Counsel for Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, and Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio, Defendants-Appellants.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT, THE CITY OF PORTSMOUTH, OHIO—
Filed September 4, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

Now comes the City of Portsmouth, Ohio, and files this its answer in the above styled and numbered cause as follows:

1. This answering defendant admits the allegations of fact stated in Item 1 of the bill of complaint filed by the United Fuel Gas Company.

2. This answering defendant admits the allegations of fact stated in Item 2 of said complaint except that it denies the allegation that the gas produced or purchased from other producers by the plaintiff in the states of West Virginia and Kentucky and transported in a continuous flow from the said states of West Virginia and Kentucky is not co-mingled with gas produced or purchased in Ohio and without reducing the pressure to which the same is so transported prior to such delivery and that said sale and delivery of gas is not interstate commerce.

[fol. 105] This answering defendant further denies that the attempt of the defendant, The Public Utilities Commission of Ohio to prescribe the price to which said United Fuel Gas Company shall sell its gas to the defendant, The Portsmouth Gas Company, regulates or interferes with the United Fuel Gas Company's business in interstate commerce or in any way violates the provisions of Section 8 of Article I of the Constitution of the United States which delegates to the Congress of the United States the power to regulate commerce with foreign nations or between the states of the United States.

This answering defendant avers that the United Fuel Gas Company out of the same pipe line used to transport its gas to The Portsmouth Gas Company delivers and distributes gas to the cities of New Boston and Ironton in the State of Ohio, which distribution system is owned and through which it charges the inhabitants of said city for

such gas. Said company also sells gas from the same pipe line supplying and furnishing gas to the City of Portsmouth, Ohio, to industries in Ohio.

This answering defendant further avers that after said gas is transported through this pipe line carrying the said United Fuel Gas Company's gas from West Virginia and Kentucky into Ohio, that it is broken down by reducing the pressure and sold at the gates of the City of Portsmouth, Ohio, in a condition different than when it enters the State of Ohio.

3. This answering defendant admits the allegations of fact stated in paragraph 3 of the bill of complaint filed by the plaintiff.

4. This answering defendant admits the allegations of fact stated by plaintiff in paragraph 4 of the bill of complaint.

5. This answering defendant admits the allegations of fact stated in paragraph 5 of the plaintiff's bill of complaint.

6. This answering defendant admits the allegations of fact stated in paragraph 6 of the bill of complaint except that this defendant denies that gas produced by United Fuel Gas Company and transported by the same pipe line [fol. 106] that is used to transport gas to the Portsmouth Gas Company, is distributed by United Fuel Gas Company to its customers in other Ohio towns without disturbing or interrupting the continuous flow of gas in said pipe line, either by reducing the pressure therein or in any other manner; this defendant further denies that the transaction covering the sale of gas from the United Fuel Gas Company to the Portsmouth Gas Company is interstate commerce; this defendant denies that the power and jurisdiction assumed by the Public Utilities Commission of Ohio to regulate the price at which United Fuel Gas Company shall sell its gas to the Portsmouth Gas Company is a regulation of interstate commerce, and denies that it is in violation of that part of Section 8 of Article I of the Constitution of the United States, conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

This defendant further denies that the orders of the Public Utilities Commission of Ohio referred to in the bill of complaint filed herein, and the statute law of the State of Ohio upon which the same are based, are null and void or in violation of that part of Section 10 of Article I of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts or that the effect of said statute of the State of Ohio as construed by the Public Utilities Commission of Ohio in said orders impairs or abrogates any lawful contract existing between United Fuel Gas Company and the Portsmouth Gas Company.

Defendant further denies that the interests of United Fuel Gas Company in said contract with Portsmouth Gas Company is a property right, or that it constitutes property of United Fuel Gas Company, or that the action of the defendant, the Public Utilities Commission of Ohio abrogates or destroys any property right belonging to United Fuel Gas Company or that it deprives United Fuel Gas Company of any valuable property without due process [fol. 107] of law, or that it denies to United Fuel Gas Company the equal protection of the laws or that it is in violation of Section 1 of the fourteenth article of Amendment of the Constitution of the United States. This defendant further denies that a compliance with the orders of the Public Utilities Commission of Ohio would entail upon United Fuel Gas Company, the expenditure of a very large sum of money or that such expense would aggregate, more than one hundred thousand dollars (\$100,000.00).

This answering defendant further denies the allegations contained in said paragraph 6 of the bill of complaint to the effect that the Public Utilities Commission of Ohio is without any jurisdiction to make the orders complained of or that the statutes under which it is acting violates the commerce clause of the Constitution of the United States, or that the expenditure of any large sum of money would be occasioned thereby. It further denies that United Fuel Gas Company will be irredeemably injured and damaged by the carrying out of the orders of the Public Utilities Commission of Ohio complained of, or that United Fuel Gas Company will be damaged to any extent whatever by carrying out said orders.

7. Defendant denies each and every allegation of fact stated in paragraph 7 of the bill of complaint.

This answering defendant further denies each and all of the allegations of fact stated in the plaintiff's bill of complaint, except insofar as the same are herein expressly and definitely admitted.

Wherefore, this answering defendant prays that the temporary restraining order heretofor granted in this cause on the 3rd day of July 1935 be vacated and set aside and that on final consideration the application for the interlocutory injunction be denied said plaintiff; said bill of complaint filed by it be dismissed at plaintiff's cost and that this answering defendant go hence without day and have judgment for its costs expended herein.

[fol. 108] The City of Portsmouth, Ohio, By W. L. Dickey, Its Attorney.

Duly sworn to by John M. Sallady. Jurat omitted in printing.

[fol. 109]. IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF DEFENDANT, PORTSMOUTH GAS COMPANY—Filed September 23, 1939

To the Honorable Judges of the District Court of the United States, Southern District of Ohio:

Comes now the defendant Portsmouth Gas Company and files its answer in the above entitled cause and for its answer to plaintiffs' bill herein says:

1. This defendant admits the allegations of fact stated in paragraph 1 of the bill of complaint.

2. This defendant admits that this suit is of a civil nature in equity and is brought for the purpose of obtaining a declaratory judgment adjudicating that the two orders of the Public Utilities Commission of Ohio referred to in paragraph 2 of the bill of complaint are unconstitutional and void and for the purpose of enjoining the enforcement of said orders as alleged in paragraph 2 of the bill of complaint.

This defendant neither admits nor denies the other allegations of fact stated in paragraph 2 of the bill of complaint.

3. This defendant admits the allegations of fact stated in paragraph 3 of the bill of complaint.

4. This defendant admits the allegations of fact stated in paragraph 4 of the bill of complaint.

[fol. 110] 5. This defendant admits the allegations of fact stated in paragraph 5 of the bill of complaint.

6. This defendant neither admits nor denies the allegations of fact stated in paragraph 6 of the bill of complaint.

7. This defendant neither admits nor denies paragraph 7 of the bill of complaint.

Wherefore having fully answered the bill of complaint and the plaintiff having prayed no relief against this defendant, this defendant prays that on final consideration, the bill of complaint be dismissed as to this answering defendant and that this defendant may go hence without day and have judgment against the plaintiff for its costs.

(Signed) John T. Beasley, Counsel for the defendant Portsmouth Gas Company.

[fols. 111-112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] Citation in usual form to City of Portsmouth and Portsmouth Gas Company omitted in printing.

[fol. 114] IN UNITED STATES DISTRICT COURT

ACKNOWLEDGEMENT OF SERVICE OF APPEAL PAPERS AND STATEMENT OF CITY OF PORTSMOUTH AND PORTSMOUTH GAS CO., ACCEPTING JURISDICTIONAL STATEMENT AS STATING THE BASIS FOR APPEAL—May 14, 1942

Receipt is hereby acknowledged of a copy of the papers, including this citation, filed by The Public Utilities Com-

mission of Ohio, et al. in its appeal entitled Public Utilities Commission of Ohio, et al. vs. United Fuel Gas Company, No. 1216 in the Supreme Court of the United States. The jurisdictional statement is accepted as stating the basis for such appeal.

The City of Portsmouth, Ohio, by Ernest G. Littleton, Its City Solicitor. The Portsmouth Gas Company, by C. W. Baughn, Its General Manager.

[fol. 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PRAECIPE

Applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry Miller, members of said Commission, Thomas J. Herbert, Attorney General of Ohio, and Kenneth L. Sater, Special Counsel for said The Public Utilities Commission of Ohio, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States and for the purpose of enabling the clerk to prepare the record for appeal herein from the final order and decree of the District Court dated January 16, 1942, to the Supreme Court of the United States, hereby requests the clerk to include in the record on such appeal, in addition to the papers and pleadings mentioned in the original praecipe, the hereinafter indicated papers and pleadings to-wit: Citation to The City of Portsmouth and The Portsmouth Gas Company and the receipt of said City and Company attached to such Citation.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for Applicants.

[fols. 116-117] Clerk's certificate to foregoing papers omitted in printing.

[fol. 118] **IN THE SUPREME COURT OF THE UNITED STATES**

[Title omitted]

**STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF
RECORD—Filed May 9, 1942**

Now come appellants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, pursuant to paragraph 9 of Rule 13 of the Revised Rules of this Court and say that the points on which they intend to rely in the case at bar are as follows:

1. The sale of natural gas by appellee, United Fuel Gas Company, to the Portsmouth Gas Company does not constitute interstate commerce under the facts established in the case at bar.

2. The two orders in question of appellee Commission, dated April 18, 1935, and May 29, 1935, impair no contract between appellee United Fuel Gas Company and the Portsmouth Gas Company for the wholesale sale and delivery of natural gas because such contract was not made at arm's length and does not constitute arm's length bargaining.

3. The two said orders of appellant Commission do not deprive appellee United Fuel Gas Company of any property without due process of law.

[fol. 119] 4. The jurisdiction of appellant Commission to promulgate and enforce its two said orders was not superseded in the case at bar by the enactment of the federal Natural Gas Act.

Appellants consider the entire record, as certified, to be necessary to a determination of this case on the merits.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for
Appellants. State House Annex, Columbus, Ohio.

[fol. 120] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—June 1, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 46,544 D. C. U. S: Southern Ohio. Term No. 87. The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, et al., Appellants, vs. United Fuel Gas Company, et al. Filed May 5, 1942. Term No. 87 O. T. 1942.

(1239)